Canadian Centre
for Occupational Health
and Safety

# Railway Accidents as a Catalyst for the Development of Workers' Compensation Legislation in Ontario:

## A Conceptual and Historical Analysis

*by*
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# RAILWAY ACCIDENTS AS A CATALYST FOR THE DEVELOPMENT OF WORKERS' COMPENSATION LEGISLATION IN ONTARIO:

# A CONCEPTUAL AND HISTORICAL ANALYSIS

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## Foreword

In this report I investigate the role of the railways in the development of workers' compensation legislation in Ontario. In order to do that I shall first examine the special relationship which the people of nineteenth-century Ontario had developed with the railways. Although this relationship was historically important for Ontario and for all of Canada, the purpose of recounting it in this report is to identify and assess the hidden values which were inherent in the nineteenth-century legislative and judicial interpretations of society.

It is the thesis of this report that the railway experience in Canada was a catalyst for the development of workers' compensation legislation. It is submitted that the concern for railway accidents in Ontario led directly to the form which the Workmen's Compensation for Injuries Act of 1886 eventually took. It is further submitted that there is a continuum between the *Railway Accidents Act* of 1881 and the *Workmen's Compensation Act* of 1914 which can only be understood by an analysis of the underlying social values of the time.

It is particularly important to understand that the 1914 Act was only possible as a result of a distinct challenge to the underlying values which were articulated in the nineteenth-century as defences to the common law liability of an employer to his servant in the event of negligence. It is submitted that this challenge was mounted in response to the numerous accidents suffered by railway workers.

In addition to dispensing with the common law defences of "the voluntary assumption of risk", "contributory negligence" and the "fellow servant rule", the 1914 Act was to a great extent a mutual-insurance Act. The railroads had been influential in this development. The railway companies were often the major defenders of liability suits. The railway workers, because of the dangers inherent in their workplace, developed early models of mutual insurance schemes.

In order to appreciate the difficulties which the nineteenth-century mind would have had in accepting the scheme enacted in 1914 it is necessary to start with an identification of the fundamental values which were widely held by the legislators, the business leaders, and, indeed, the citizens of the day. In order to understand how it was possible for this change to come about, it is instructive to understand another. The high value placed on individual freedom led to contradictory conclusions, which depended on whose freedom was at issue. The traditional belief that it was morally wrong to obtain an advantage from the suffering or death of another

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*continued*

human being was challenged by the new "myth* of progress" and the values which it entailed. The railway experience was very much at the centre of these contradictions and conflicts.

It is submitted that the conflicts inherent in these values would not have been resolved in the way they were without the significant contribution of information about railway accidents. In conclusion, it is further submitted, that *information* on human vulnerability in certain circumstances is a necessary precondition of legislative and regulatory improvement in the field of occupational health and safety in general, and in workers' compensation in particular.

It is further submitted that information is vital in considerations of deterrence in the field of occupational health and safety. This derives from two facts:

1. that workers cannot be made any more careful by punishing them any more than the results of occupational accident and illness have already punished them; and,

2. that as a consequence, deterrence is only possible through an increased awareness of the risks involved.

The important aspect of the 1914 Workmen's Compensation Act as an insurance scheme has not been stressed in what follows. This is not to deny the character of the modern legislative scheme as a kind of insurance scheme. Rather, since this characteristic is widely accepted and written about, our focus is to show:

1. that the development of workers' compensation legislation in Ontario as an insurance scheme is *only one solution* to a problem;

2. that the Ontario solution is historically based and was arrived at, in large part, as an attempt to resolve the conflicts which were inherent in the values of nineteenth-century society;

3. that railway accidents acted as a *catalyst* in this development by forcing the legislature to achieve a new balance between these conflicting values.

The railway benevolent societies were developed in an effort by railwaymen to spread the risks of the workplace amongst themselves. They were thus early models of the workers'

*The word "myth" is used in its original Greek sense of "*mythos*" which means: a story about the gods. The gods, of course, belong to the realm of belief which is beyond intellectual scrutiny or reason. By the nineteenth-century, "progress" had become such a "god", the requirements and very existence of which were increasingly beyond intellectual scrutiny.

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*continued*

compensation *insurance* scheme. They were already functioning long before the 1914 *Workmen's Compensation Act* was passed. It is no exaggeration to say that they even provided a model for consideration by Sir William Meredith when he developed the modern scheme. This would also explain why the railways which had such insurance schemes were initially exempted from the 1914 Act.

There is nothing either absolutely essential or merely arbitrary about the present workers' compensation scheme. As improvements are sought in the future it would be well to remember that our present scheme originally evolved as an attempt to resolve, as far as the impact on workers was concerned, the conflicts between widely-held underlying values. Before making "improvements", therefore, it is important to determine whether other values ought also to be included in the balance.

The continuing concerns, for example, for the prevention of accidents and disease in the workplace, and for the costs of maintaining the system, as well as for the equity of having "good" employers essentially subsidize "bad" ones all demonstrate that the present "insurance" scheme:

1. is not beyond improvement; and

2. requires an analysis of the values by which such an improvement is to be judged.

I am prepared to argue although that is beyond the scope of this writing, that *prevention* must be given a higher priority in whatever scheme develops. This follows from both the economical and the moral perspective. The costs of running the system are high and ever increasing. The pain and suffering continue. If any pain or suffering is "avoidable" or "not inevitable", a serious moral question still remains.

How can we justify maintaining our standard of living, increasing our profits, or keeping the cost of our consumption down by taking advantage of the pain and suffering of other human beings?

A competing consideration in contemporary society is that, if occupational health and safety is too stringently regulated, jobs will be lost to non-regulated enterprises beyond the jurisdiction. Achieving acceptable levels of occupational health and safety in one jurisdiction becomes a problem of global dimensions. Unless there is a global solution, it might be necessary to impose some sort of protection, by way of tariff, for example. In this way, the costs of achieving an acceptable level of occupational health and safety could be assessed as a tax on goods coming from non-regulated jurisdictions. Such a measure, however, would present

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*continued*

a serious challenge to contemporary values which stress the virtues of a *free* market and its international counterpart, *free* trade.

This is not a matter of narrow partisan political concern. In a sophisticated, complex, technological society, such as our own, it is almost universally accepted that some kinds of exceptions must be made to general principles. These "exceptions" are justified with reference to higher principles or values. The question is:- How is such a special status to be protected within the broader scheme of a free market, both nationally and internationally?

In contemporary society many of the same values are competing as in the time before the early workmen's compensation legislation. Take, for example, the ideal of freedom. In the nineteenth-century this ideal was used to deny the liability of a master for the acts of negligence of one servant resulting in losses to another. It was also used to discourage the regulation of industry. Only later was the right of the worker to be *free* from unnecessary occupational hazards addressed. The ideal of freedom persists today in the notion of the free market and free trade.

The question today is still a matter of balancing the interests of workers and owners, while maintaining a high level of occupational health and safety and providing for injured and diseased workers. In order to achieve this equitably, new institutional arrangements may be necessary. If the "costs" are not to be shifted to the workers, or to the responsible employers, it will be necessary to re-think how the balance is to be achieved. Consider the following proposal by way of illustration: A scheme of prevention might be established which would require the "bad" employers to pay for *all* of the costs of their way of doing business. Their liability to pay would be absolute once it was established that their operations did not meet the prescribed standards. The solution would therefore be an economic one, since the infringement of the relevant standards would be too costly to permit the "bad" employer to remain competitive. This solution would also benefit the "good" employer, since his competitive disadvantage from the implementation of health and safety measures would be quickly removed.

In such a "modified tort approach" the burden of prosecution and enforcement would be borne by an independent body, and assessed to the bad employer. The costs of the occupational health and safety measures instituted by the "good" employers would, of course, be borne by the ultimate user of the product or service. As is pointed out above, however, such a solution requires the co-operation or protection from non-regulated enterprises beyond the jurisdiction.

Many questions would have to be resolved before this or any other approach could lead to an improvement of the present scheme.

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*continued*

For example: What about considerations of natural justice with respect to the so-called "bad" employer? How can it be *objectively* determined that the employer is "bad"? What kinds of safeguards can be built into the system? Will this not add unnecessary and unproductive levels of bureaucratic interference with commerce? What would the overall economic consequences be? Would employers move out of the jurisdiction to avoid the consequences? Could such a scheme work within the existing judicial system? Or would it require the creation of a new tribunal or court? Are there inherent constitutional problems with the creation of such a court? How could this be resolved between the federal and provincial governments? What about the suicidal, or willfully careless employee? Should he or she be excluded from benefits?

Needless to say, one cannot even hope to resolve all such issues in a paper such as this. I raise them only to point out that there can be no "solution" or "improvement" in a vacuum. In the long run a "purely economic" criterion may end up deciding the issue of what is equitable, or just, in the circumstances. Ultimately we should ask: Is the solution based on such a criterion also morally acceptable?

The history of the development of workers' compensation legislation reveals a systematic difficulty in ultimately recognizing the moral worth of the individual worker. This has led to frequent conflicts with public moral judgments. The result has been various legislative attempts to remedy the problems as they were perceived.

The *laissez-faire* assumptions of the judges and the captains of industry in the middle of the nineteenth-century were at odds with the intuitive moral principles of society as a whole. The tension which this conflict caused led to more and more regulation of industries. The railways were among the first to be regulated in a significant way. At first, the attempts were timid tokens which were used politically to justify the massive government support, financial and otherwise, in the development of railways.

This activity of government was definitely not *laissez-faire*. The involvement of railways in accepting the government money and assistance was also not *laissez-faire*. There was hypocrisy in that respect, and principle was sacrificed to profits and the promise of profits.

Nevertheless, the attitude of the railway management and of the courts remained predominantly *laissez-faire* throughout the nineteenth-century. The idea was that, left alone, business would do what was best for everyone. This is simply one assessment of whose "freedom" is more important.

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*continued*

The moral judgment inherent in this proposition derives from the answer to the further question of whether or not what is best for everyone is also best for the individual worker. For example, a perfectly efficient, productive, and profitable railway, or coal-mine, may still have to account for the early deaths and respiratory ailments of its workers. The resolution of these issues in the past has been predominantly utilitarian. The rights of the workers have been balanced against the values which others place, for example, on railway service and the consumption of coal. Perhaps ultimately the utilitarian calculation is the only way to resolve these inherent conflicts between human moral values and the pain, suffering and death which seem to be necessary to supply our wants and needs in a technological society.

It is to be hoped, however, that by assessing the conceptual underpinnings of the *"laissez-faire"* model of justice for workers in the nineteenth-century that the moral worth of the individual worker can be rehabilitated. I hope to show this by an analysis of the various defences such as the voluntary assumption of risk, and the fellow servant rule which were available at common law to defeat an injured worker's claims for compensation from his employer.

If an individual worker's right to compensation is established, the next issue becomes: Who should pay the costs? Logically and morally the immediate answer appears to be: The person who is responsible for the injury in the first place. Ultimately this responsibility is transferred to the user of the end product or service, since this cost would have to be passed on by the person responsible, as a cost of doing business. This would have a secondary moral effect, in that the enterprise responsible for such injury or disease would be driven out of business if it did not eliminate, or at least minimize the risks to occupational health and safety. This model is only effective, however, if all of the costs are assessed against those responsible.

The existing tort system has proven to be far too costly and unwieldy to handle these kinds of cases with results which are satisfactory to all concerned. Up until now, the answer has been to depart from fault assessment almost entirely and to distribute the costs among the employers in certain classes. The system which has resulted is a compromise of the *rights* of the worker *for* the *certainty* of a payment when it is needed most.

The following review of the impact of railway accidents on the development of workers' compensation legislation in Ontario leads one to ask: How can the losses to workers, which have been brought about by occupation-related causes, be fully compensated by those responsible? Can it be just or moral if either the losses are not fully compensated or if someone other than the persons responsible pays the compensation? Although insurance schemes

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are ideal for the purposes of planning and spreading the risk of an enterprise, are they also not an obstruction to accountability, and an active hindrance to prevention? Is a modified tort system the answer?

These are questions which I hope that this paper will put into better perspective as questions. I do not presume, however, to have answered them.

**The importance of railways to the Dominion**

When John Graves Simcoe was the Governor of Upper Canada, near the end of the eighteenth-century, the quickest and most reliable way for him to travel from Cataraqui, near Kingston, to Newark, which is now Niagara-on-the-Lake, was by means of an open boat. There were very few roads. Those which did exist were very difficult on which to travel. The transportation of tools, equipment, foodstuffs, supplies, and goods of any kind was difficult and extremely costly. As a result, except for the purposes of the very rich, or the very powerful, only the barest essentials could be shipped from place to place.

After 1784, as the lands west of the Ottawa River were opened up for settlement, the early pioneers of Upper Canada were faced with the task of taming the wilderness and establishing a viable economy. The first land to be settled was that along the lake and river fronts. It was there that a reliable method of shipping had already been established. Most of the interior, however, was virtually inaccessible until a network of primitive roads and trails was established. Probably because of the great distances and the cost of shipping, the early economy of Upper Canada was largely agricultural in character. It was also mostly self-sufficient.

Whether or not the development of an extensive and efficient railway system was an absolute prerequisite for the development of the Canadian economy, from about the middle of the nineteenth-century the public perception was that a nation would not develop without one. If the land was to be developed and farmed, it would have to be possible to get the produce and manufactured goods to market efficiently and quickly. If products were to be sold, they would have to be shipped into the hinterland, away from the shores of the Great Lakes and their adjacent rivers.

There were those, such as Sir Allan McNab, who saw the existence of the railway as an absolute precondition for the development of an industrial economy. There were those, such as Sir John A. Macdonald, whose dream of a British Dominion from sea to sea was thought to be only possible with the building of a transcontinental railway. There were those who cherished the preservation of British values on North American soil, and who regarded the westward growth of the American colonies with

**The importance of railways to the Dominion**
*continued*

utmost suspicions. Thus, to the economic impetus was added the political and military assessment of the value of the railways.

In 1849 T.C. Keefer extolled the virtues of the railway. At that time, there were less than sixty miles of railway in all of British North America. According to Keefer, speed, economy, regularity and safety were amongst its most prominent features. The railway was a faster way of moving goods than the canal. It was more efficient than travel by horse. It could be relied upon in any weather. It was much safer than the steam-boat.

In Keefer's assessment, the railway would create a certain magic wherever it was constructed:

> *"Milk, fruits, and vegetables, for immediate use, will not bear ten or twelve hours jolting over fifty miles of the best turnpike to reach a market; while fresh meats, fish, eggs, cattle, pigs, and poultry, lumber, staves, shingles, and firewood, and any other necessaries of life, either could not afford the time or the cost of a hundred miles transport by horsepower. The production of these articles, therefore, is very limited in certain districts; but wherever a railway takes its track their extensive production becomes at once a new element of wealth, and the locomotive a public benefactor - making 'two blades of grass grow where only one grew before,' thus the essence of a railway system is to increase its own traffic, adding twenty-five per cent to the value of every farm within fifty miles of the track, doubling that of those near it, and quadrupling the value of timbered lands through which they pass. Railroads are in one respect more economical carriers than canals, inasmuch as they are both freight and toll receivers, and are therefore content with one profit."*[1]

Not every supporter of railways shared the enthusiasm and optimism of T.C. Keefer. Many others accepted the enormous burden of railway building with the specific understanding that such was the necessary cost of technological development. Without the development of the railways, it was thought that there could not be a nation from sea to sea.

Such views were not restricted to the schemes of Sir Allan McNab or Sir John A. Macdonald in Canada. The record of the 37th Congress of the United States shows that it was also very much a part of the thinking in the United States as well as in Canada. Senator Clark of New Hampshire, when considering the desirability of building the Union Pacific Railway, said:

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1. T.C. Keefer, *Philosophy of Railroads*, edited with an introduction by H.V. Nelles, Toronto: University of Toronto Press, pp. 12-13.

**The importance of railways to the Dominion**
*continued*

*"...The senator from Kansas thinks it will be a good paying road. I believe that if the good God were to make that road for you, right through, you could not form a company in the country today that would run it without failure...whether I am right or not, I do not build a road because I think it is to be a paying road; I build it as a political necessity, to bind the country together and to hold it together, and I do not care whether it is to pay or not; here is the mind of the government to building."*[2]

In 1871 British Columbia was promised the construction of a railway as consideration for its joining the Dominion of Canada. A contemporary comment on that event reflected both the enthusiasm of Keefer and the political considerations of the United States senators. In their book *The Railways of Canada for 1870-1871*, J.M. and Edward Trout said:

*"To a country with the physical configuration of the Dominion - stretching from the Atlantic to the Pacific, and settled only by a relatively narrow frontier strip - cheap and rapid communication is one of the first prerequisites. The intercolonial was no doubt projected more as a political than as a commercial undertaking, and very great advantages may be expected from it in the way of bringing about acquaintanceship, creating and riveting social ties and commercial relations, breaking down antipathies and creating the sense of a common interest. Let us hope that as a military convenience it will never be called into requisition. As a means of opening up a new country for settlement, railways are incomparably the best and most effective viewed in light of results, that human skill has yet devised. Like the arteries and veins of the human body, they are the channels which vitalize the extremities of the country, and bring them into direct and immediate connection with the centres of commerce." They give value to natural products before valueless, because out of the reach of consumers; change sterility into productiveness; convert the wilderness into cultivated farms, as if by magic, and substitute for the profitless hunting of the wild man of the forest, the peaceful and remunerative operations of modern husbandry. Railways have accomplished all this in Canada, but the work is only fairly begun."*[3]

2. From the 37th Congress, 2nd Session, p. 2788, cited in *History of the Union Pacific Railway* by Henry K. White, 1895, reprinted by Augustus M. Kelly Publishers, Clooston, 1973 at p. 69.

3. J.M. and Edward Trout, *The Railways of Canada from 1870-71*, Toronto: Monetary Times, 1871, pp. 31-32.

**The Importance of railways to the Dominion**
*continued*

As a measure of the advance of the railway industry, it is significant to observe that, from the time of Keefer's lectures in 1849 until the comments of Edward Trout in 1871, railway growth was phenomenal. Whereas in 1849 there were less than 60 miles of track in all of British North America, by 1871 there were several times that many miles of track. It was even said that the receipts of the railways were nearly equal to the entire public revenue of about fourteen millions of dollars.(4)

Such was the optimism that the railway would be extremely profitable that many charters issued to railway companies provided that a share of the net earnings over a ten per cent dividend would be returned to the public coffers. Not only did this not happen, but many railways, such as the Northern, experienced serious pecuniary difficulties. The excessive optimism of the 1850's was soured by the realities of recession in the 1860's and the attendant failure of railways. Over this period of time, the financing of railways went through a series of stages from pure private enterprise to total government involvement.(5)

The Government of the United Provinces of Canada enacted the *Railroad Guaranty Act* of 1849 in order to assist in the construction of railways.(6) The Act began by recognizing that government assistance might be necessary in countries which have small populations. For railways in excess of seventy miles in length the province guaranteed the interest on loans up to six per cent; and up to one-half of the entire cost of the road after at least a half of the road had been completed. These amounts would only be made available when the further amount guaranteed would allow the road to be completed to the government's satisfaction.

The guaranty of the government was to be repaid before any dividends could be declared. Thus it was thought that the government could never be in any great risk. Later, as several railways were facing imminent failure, governments were forced to postpone their security in favour of private money which had been sought to keep the companies afloat.

It was claimed in *The 1866-67 Annual Report of the Department of Public Works for the Province of Canada* that only three out of seventeen railways had received assistance from the government. These were the Great Western, the Northern and the Grand Trunk.(7)

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4. *Ibid.*, p. 31.

5. *Ibid.*, pp. 30-39.

6. 12 Victoria C. 29.

7. Pp. 554-55.

**The importance of railways to the Dominion** *continued*

This, however, appears to be misleading. In *The Railways of Canada*, nineteen different phases of railway finance are outlined, many of which involved governments directly and indirectly.[8] Moreover, it is stated:

> *"A marked peculiarity in the mode of financing adopted by recent projects consists in seeking municipal and government aid in the shape of bonuses and not as subscribed stock. This is the most honest and proper method, in that it raises no false hopes and prevents the disappointment and embarrassment that would certainly otherwise ensue. Many of the municipalities have contributed most liberally with this form; the government of Ontario, with commendable wisdom, has set aside $1,500,000 to be granted by way of bonus, in sums ranging from $2,000 to $4,000 per mile, according to circumstances."*[9]

The return to the legislative assembly dated September 1, 1875 respecting railway aid and subsidy funds shows that thirteen railways were aided in the amount totalling $1,154,388 and twelve other railways received subsidy funds in excess of $98,500.[10] Furthermore, some twenty railways received municipal bonuses in excess of $6,100,000 total.[11] The situation was roughly the same in the report of 1877.[12] But in 1880 some twenty-five railways were receiving yearly direct grants of $1,685,409.[13]

In addition to making these direct grants, the government of the Province of Ontario had begun the policy of issuing "scrip." This was a form of annuity issued to aid the railways. The total value of such scrip as of the first of January 1884 was $2,091,264.81.[14] It was further calculated that, if the railway certificates outstanding in 1884 were taken up and new annuities were issued, this would involve an aggregate payment of $6,195,967.60.[15]

8. *The Railways of Canada*, pp. 38-39.
9. *Ibid.*, p. 39.
10. Ontario Sessional Papers (No. 30), 30 Victoria, 1875-1876.
11. Ontario Sessional Papers (No. 43), 39 Victoria, 1875-76.
12. Ontario Sessional Papers (No. 9), 40 Victoria, 1877.
13. Ontario Sessional Papers (No. 56), 43 Victoria, 1880.
14. Ontario Sessional Papers (No. 85), 47 Victoria, 1884.
15. Ontario Sessional Papers (No. 86), 47 Victoria, 1884 at p. 3.

**The importance of railways to the Dominion**
*continued*

Too many railways had ceased to be the "sure-fired" way to private prosperity. They had become a problem which demanded a complex and increasingly demanding public involvement. By the 1880's it must have seemed to the people of Ontario, and to the Legislative Assembly of Ontario, that the railways had become something of a financial burden around their collective necks.

**Working on the railway: inevitable accident?**

It is perhaps no exaggeration to say that in the nineteenth-century a railway man's life was at risk almost every moment of his working day. Probably the most significant of these dangers involved the coupling of cars and the application of the brakes on a moving train. Before the widespread use of an automatic coupler, it was the practice of the railways to require a workman go between the cars to hook them up by means of a drawbar and a pin. He had to lift the drawbar into place and then insert the pin through a hole at the end of the drawbar. Moreover, he had to do this while the cars were coming together and while they were moving along the track.

When it was necessary to slow a train, or to bring it to a full stop, the brakeman was required to crawl over the top of the cars and to apply enough of the individual brakes on individual cars in the right places to slow or stop the train as desired. Conversely when it was desired that the train would go faster, the brakes had to be released. The problems with both of these tasks were enormous, as is evidenced by the following accounts.

*Coupling the cars:*

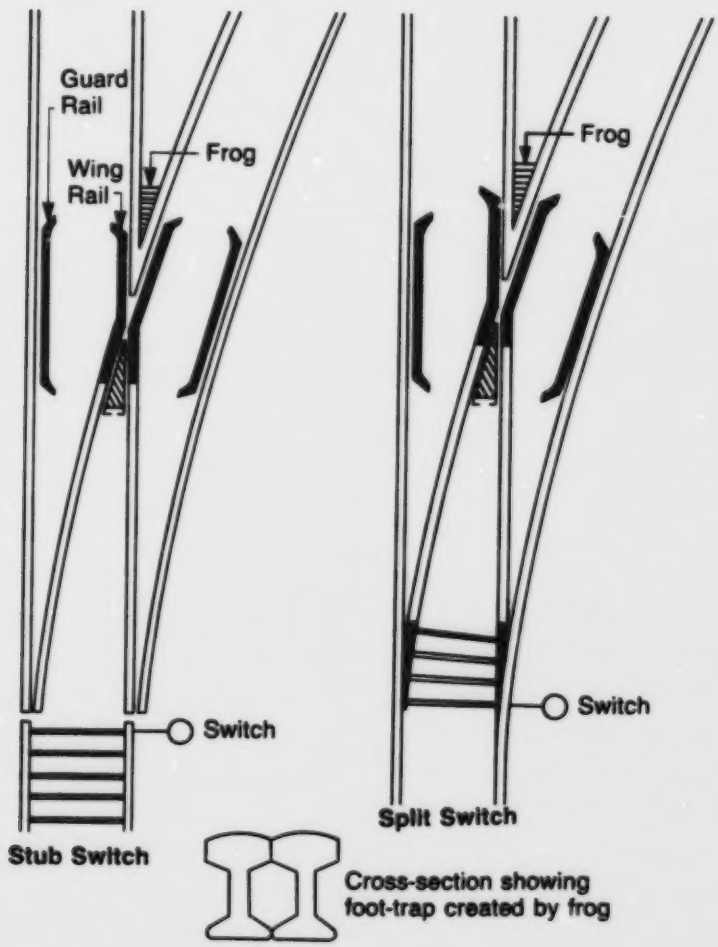
*"At present the man about to couple the cars, having first seen that the link and pins are in place, usually steps in on Working on the the rail or ties between the cars, just before they come together; if the train has been backed up very quietly and cautiously, so as just to bring the bumpers together without imparting any motion to the car that had been stationary, the work of coupling is very simple, and can be performed, after a little practice, by any reasonably intelligent man, without the slightest danger. If, however, as more generally happens, particularly with a heavy train, the cars come together with a shock, the great weight and momentum of the engine and cars attached to it usually forces the car that had been stationary violently backwards, often as much as fifty feet or more; in this case the man has, while engaged in adjusting the link and pins, at the same time to keep pace with the cars, running along between them, over slippery rails, frogs, ties, switches, etc. In doing this, if he devotes too much attention to his feet, or where he places them, the chances are he will get squeezed between the bumpers; while*

**Working on the railway: inevitable accident?** *continued*

*if he devotes over-attention to his hands and the work of coupling he runs a good chance of slipping or catching his foot in a frog, switch or other obstruction, and so being run over."*(16)

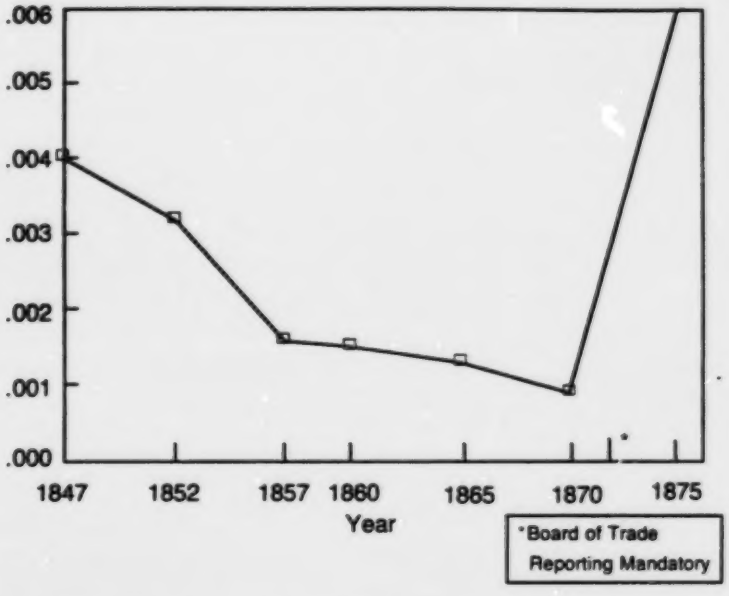
The "frogs" referred to in this account are the v-shaped intersections formed by two sets of tracks coming together at an angle. Since the rails are thicker on the top and on the bottom, the frog creates a foot-trap. In a situation such as is described in the above account of the coupling, a split-second's delay could mean sudden death.

**The frog or crossing**




16. *Report of the Select Committee on Railway Accidents*, 43 Victoria, Appendix No. 1. 1880. P. 42.

**The probability of English railway workers suffering death or injury in the workplace during the year**




Based on statistics published by the Board of Trade, cited in Victorian Railwaymen p. 47.

**Working on the railway: inevitable accident?**
*continued*

*Applying the brakes:*

*"In reference to brakesmen on top of cars, I find that the idea is very prevalent that a brakesman can, after a little experience and practice, run along the top of the train (running at the regular or usual speed), as easily as a person can do on the ground or pavement. I may say, from my own experience, that such is not the case, and that the idea is simply absurd. It is true that after little practice a man can get over a train with a certain degree of steadiness which can only be acquired by practice. I have frequently had to go almost the length of a train on my hands and knees, and hold on very firmly at that, to prevent myself from being blown off; this in windy weather. I have also had to do the same in sleety weather, or when the cars were covered with ice. As it is beyond the power of man to control the weather in any way, we have therefore to devise means by which we can counterbalance the effects of bad and rough weather."*[17]

The brakeman's job was one of enormous responsibility. The principal way of stopping the train, of course, was to apply the brakes. It was generally thought that the practice of applying steam to reverse the direction of the wheels was exceedingly destructive of the rods, the drive shaft, the wheels and the rails themselves. It was thus only utilized in times of extreme danger. Even then, it was not totally effective.

With a fully loaded train of any significant size, it was necessary to apply several brakes. Since these brakes were often not kept in good condition, the brakeman could find himself scrambling frantically from car to car in order to apply sufficient braking power to slow the train in time. The only way in which this could be accomplished was along the top of the cars along a wooden "running-board." The moving cars would jerk and lurch and roll while the brakeman made his way from car to car.

The cars were generally about thirty-one inches apart, although some were as much as forty inches apart. Although the cars were generally about eleven feet high, not all cars were exactly the same height. Some specially-made furniture cars were higher. Moreover, flat cars and ore cars were often linked together with boxcars. They were all of a different height and configuration. This in itself was quite dangerous to the brakeman.

Upon reaching the car on which the brakeman wished to apply the brakes he often had to descend between the cars on a ladder. He then applied the brakes by turning a wheel at the end of the

17. *Ibid.*, p. 41.

**Working on the railway: inevitable accident?** *continued*

car which was attached to the brake. Some brake-wheels were on top of the cars. In either case a man could lose his balance while trying to turn them. Sometimes the ladders gave way, casting the man to a certain death between the cars. Generally, however, it was the misjudged step between the cars that led to this horrible end.

In addition to these dangers, railways often passed beneath bridges which were so low that they caused the brakemen to come into collision with them. The result of this was frequently instant death, either from the collision, or from being knocked off the train between the cars. The solution to this problem which was adopted by several companies was to place a wire across the track with knotted ropes suspended at a level just above the cars. This was designed to "warn" the man on the car that a low bridge was coming. Nevertheless, the warning was itself quite dangerous, since it would startle the men, or cause them to scramble to avoid it. This in turn would cause them to lose their balance and, possibly, fall off the train.[18]

The task of brakemen would seem to have been demanding enough in the broad light of a clear dry day. But on a cold, windy, sleety winter's night it would seem to be impossible to perform it in safety. The rate of accidental death or injury amongst brakemen was inordinately high. In general, railwaymen were at great risk wherever they worked.

Since Great Britain and the United States had developed railway systems a few years prior to the development of railways in Canada, Canadian legislators had the distinct benefit of being able to refer to other ways of dealing with difficult and complex problems. There was an alarming incidence of death and injury on railways in the U.S. and Great Britain. There were legislative responses from which to learn.

By 1871 it was calculated that the annual risk of injury or death to British railwaymen belonging to the Railway Benevolent Institution was one in thirty-seven.[19] According to the figures supplied by the railways themselves, the risk of injury or death amongst railwaymen went down from 1847 when it was one in 250 to one in 1,125 in 1870. These figures must, however, be regarded with extreme suspicion, since the railways were not required to report all accidents until 1871. Other factors were also at work making the interpretation more complicated.

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18. *Ibid.*, p. 42.

19. *Railway Benevolent Institution Annual Reports 1871* as cited in P. W. Kingsford, *Victorian Railway Men*, Frank Cass & Co., 1970, p. 47.

**Working on the railway: inevitable accident?**
*continued*

In 1871 the railway companies were required to report to the Board of Trade all accidents resulting in injury or death. Mysteriously the proportion of killed and injured to employed rose to one in 167 according to the official reports.[20] Had there been a dramatic increase in risk? Most likely the reporting requirement had brought about a burst of new information about a danger which had always existed as long as there had been railways.

According to Dr. Kingsford:

> *"Risk existed for various reasons: long hours of work, unpunctuality and carelessness, indifference of the companies arising partly from lack of publicity and of compulsion to report accidents, an expressed inadequate safety regulations and devices. Contemporary opinion was definite enough although it might differ as to the causes. 'The railway system comprised an entirely new era in the history of mankind but no class of men in the entire community were exposed to more constant risk of life and limb in the public service than railwaymen...the risks to which railwaymen were exposed were far greater than those of ordinary workmen.'..."*[21]

On February 26, 1877 the Ontario legislature ordered a report of all accidents and casualties for the years 1874, 1875 and 1876 which had occurred on the railways in the Province of Ontario.[22] It would appear that the Ontario legislature may have taken its cue from the reporting requirements of the British Board of Trade. Whatever spurred it on, by the mid 1870's there was an increasing and distinct concern about the high rate of railway accidents in Ontario.

It would further appear that the people of Ontario, who were obliged to assume more and more of the financial obligations of the railways, were becoming more conscious of the carnage which was attendant upon their operation. In 1880 the Select Committee on Railway Accidents tabled its report to the Legislative Assembly of the Province of Ontario.[23] The very next year the legislature enacted the *Railway Accidents Act*.

The continuing relative importance of serious railway accidents can be seen in the figures of industrial accidents for the whole of Canada for the year 1911. Out of 1,065 people killed in industrial

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20. *Ibid.*

21. *Ibid.*, p. 46, citing *Reports of Railway Benevolent Institutions*, Sir William Fairburn, 1865. W.F. Mills, *The Railway Service*, 1867.

22. Ontario Sessional Papers (No. 14), 41 Victoria, 1878.

23. Ontario Sessional Papers Appendix (No. 1), 42 Victoria, 1880.

**Working on the railway: inevitable accident?** *continued*

accidents that year, 312 of them were involved in railway transportation of some sort. Out of 1,986 people who were seriously injured that year, 347 of them were railway transportation employees of some sort. In the 1913 Report of the Inspectors of Factories[24] for the year 1912 with a total reporting working population of 238,257, there were 61 fatalities out of 1,502 accidents reported. This shows that, in relation to injuries suffered by factory workers, a seriously disproportionate number of railway workers was killed or injured. It is, moreover, a sobering fact that almost half of the *reported* railway accidents were fatal.[25]

**Table 1** Industrial accidents for the whole of of Canada, 1911[26]

| Trade | Killed | Injured | Total |
|---|---|---|---|
| Agriculture | 150 | 179 | 329 |
| Mining | 119 | 122 | 241 |
| Lumbering | 75 | 110 | 185 |
| Fishing and Hunting | 25 | 1 | 26 |
| *Transportation-Railway | 193 | 292 | 485 |
| Transportation-Navigation | 33 | 131 | 164 |
| *Transportation-Electric Railway | 104 | 36 | 140 |
| Miscellaneous Transportation | 3 | 11 | 14 |
| *Railway Construction | 15 | 19 | 34 |
| Metal Trades | 95 | 376 | 471 |
| Building Trades | 74 | 188 | 262 |
| Wood Working Trades | 10 | 108 | 118 |
| Food and Tobacco | 10 | 44 | 54 |
| Textile Trades | 4 | 17 | 21 |
| Clothing Trades | 2 | 9 | 11 |
| Printing Trades | | 13 | 13 |
| Leather Trades | | 8 | 8 |
| Unclassified Skilled Trades | 58 | 101 | 159 |
| Unskilled Labour | 80 | 134 | 214 |
| Public Employees | 15 | 87 | 102 |
| | 1065 | 1986 | 3051 |

*Note: See chart on the following page*

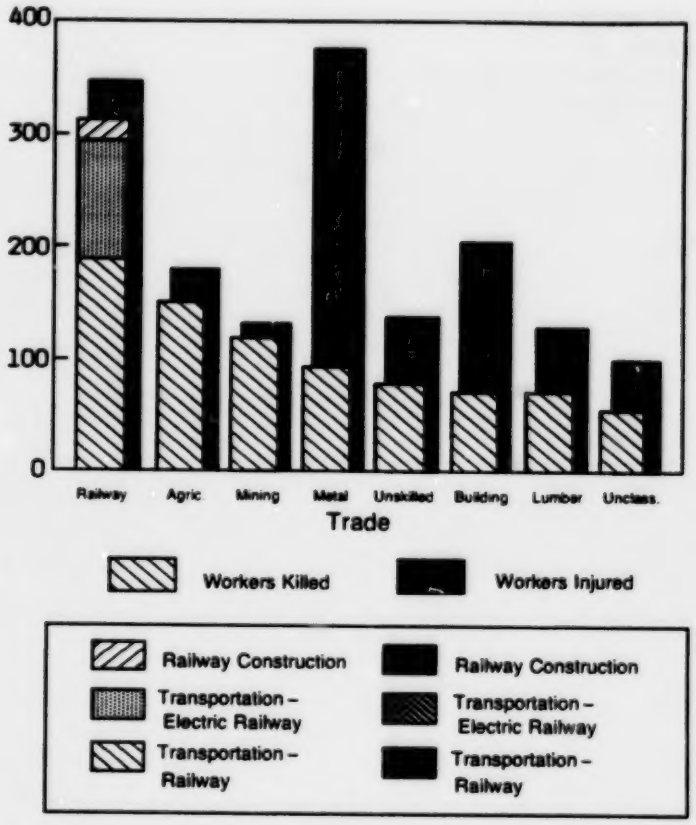
24. Ontario Sessional Papers, No. 45, 1913, Vol. XLV, Part XI.

25. Ontario Sessional Papers, No. 65, 1912, p. 365.

26. First interim report, Ontario Sessional Papers, No. 65, 1912, p. 365.

**Workers killed and injured in industrial accidents in Canada, 1911**

Listed according to trade



**Working on the railway: inevitable accident?** *continued*

These figures were compiled by Mr. Merrick of the Employers' Association of Toronto from reports in the "Labour Gazette" of accidents taking place in Canada. Mr. Gibbons, however, who represented the Toronto Street Railway Union, thought that this number was far too low. He said:

> *"I do not think the figures can be correct. You gave some figures as to the number of injured. I think that there must be that many injured here every week. The Toronto Railway Company would think they got off lightly if they did not have more than that every week."*(27)

Although the incidence of death among railway workers appears to be disproportionately high, it would seem that the reported figures quite probably represent only a small fraction of the total occurrence of accidental death or injury to railwaymen. In addition to the problems of getting the proper accident statistics, it was also very difficult to assess the cause of the accident or whose fault it was, especially if the railway company had been to blame for a fatal accident. In the words of Mr. Meredith:

> *"I have been railroading since 1866. That is something over forty-five years, and I have found that it is one of the greatest difficulties in the world to settle the responsibility for an accident...you will find every different workman in his different class will try to set the accident on the other fellow, and the company will generally try if a man is killed to put the blame on him...A dead man can say nothing...When we had an accident happen it was my duty to go home and make out a casualty report...if it reflected a little on the company, why, you were pretty nearly sure to lose your job."*(28)

**Railways and their employees**

Although it was recognized that railway workers were usually better-paid than their counterparts in general industry, throughout the nineteenth-century the threat to the railway worker's life was balanced by the threat to his employment. It was not that railway companies would regularly dismiss their trained engineers and brakemen whose skills were hard to replace. Rather, it was made abundantly clear to all concerned that management was in charge. The worker was made to realize that he could be dismissed on a mere whim. During one early labour action a railway executive was heard to say:

27. *Ibid.*, p. 366.

28. *Ibid.*, p. 366.

**Railways and their employees** *continued*

*"We should show him once and for all that the row is not a question of money but as to who shall manage the road."*(29)

The companies worked their men long and hard. No doubt this situation was aggravated by the fact that the majority of railways in the nineteenth-century frequently fell on rough times. The strains of the job took its toll, as can be seen from these observations from a union perspective:

*"The conditions of a trainman's life are hard. If he developed into a man of business, or if he becomes a manager of great enterprises, it is in defiance of his surroundings. He usually enters into early life upon his occupation in which there is a premium on strength, alertness and endurance, and in which there is much of both physical weariness and mental dissipation. He is commonly exposed to allurements that tend downwards. Along the line there are drinking places; if not in the station itself, then within a door or two...But almost all roads in this country have come in a very effective way, to testify to the capability of the character of the railroad employee."*(30)

If a railwayman was injured in his employment, the employer accepted no responsibility unless it could be proven that it was clearly at fault. Since this was extremely difficult, if not impossible, to prove in most cases, the railway employee was often left with a diminished or a completely destroyed capacity to earn a living. He was also without compensation for his losses.

Incredible as it may seem, the railways not only pushed their men beyond the limits of safety, but they also developed sets of safety-rules which were shams designed for public relations, on the one hand, and calculated to trap the employee, on the other. The sham was that the safety rules were not intended to be followed. The trap was that if they were not followed the employee who suffered an injury while failing to observe the safety rules was thereby denied recovery as a result of his own negligence.

When Sir William Meredith, who was sitting as the commissioner for the 1912 hearings, heard such a claim he was incredulous. Mr. Gibbons, for the Toronto Street Railway Union, had challenged the statistics which purported to show that something between

29. Alfred D. Chandler, Jr., Editor, *The Railroads: The Nation's First Big Business*, Sources and Readings, New York: Harcourt Brace and World, 1965, p. 129.

30. *Ibid.*, p. 134

**Railways and their employees**
*continued*

28 or 51 per cent of the accidents caused on the railway were the fault of the workman. He maintained that, not only were these cases which had never been subjected to critical investigation, as in a court of law, but that many of them resulted from the practice of laying down "phony" rules and requiring the employee to break them:

> *"**Mr. Gibbons:** It may be due to the employee not observing rules laid down by the companies. Now, let me point out to you here, as I did before, - we will take a piece of road over which a train is running, or a streetcar is running and you will find that at the car barns they're not to run more than four miles an hour, and that at another point, 'all cars must stop here,' and another, that 'the motorman must shut off his power and have his car under control at each crossing,' and 'must go slow past cars.' Then you go to the schedule and you find he has twenty-four minutes to go from the Union Station to North Toronto, and if he observed those rules he could not do it in thirty-five minutes, and if he does not observe one of them, then he is guilty of negligence."*[31]
>
> *"**Mr. Gibbons:** Do not some employers escape liability at the present time by breaking rules, and the breaking of the rules is considered contributory negligence? Do they not escape by making rules that it is not practical to carry out, and which they do not expect to be carried out?...*
>
> ***The Commissioner:** ...I do not think that any company deliberately sets to work to make rules in order that they may catch their employees if any accident happens to them. I cannot believe that. I think it is rather the other way, in dealing with the double-headed danger that they are under, that these rules are formulated.*
>
> ***Mr. Gibbons:** They must know that under the operation of the road as they want it operated, it is impossible to carry certain of the rules out. They say a trip must be made in a certain time, and they state you must go at such a rate of speed down a certain hill, and you must bring your car to a stop at such a place, and you must have it under control at other places, when actually they must know, if they ever think of it, that you could not do it in probably double the time they allow you. The law must be broken, and in case of an accident if that man was running down a hill at a rapid rate of speed, and the car jumped the track and he was killed, they would escape liability on the claim that he was breaking that rule and violating the rules of company.*

31. Ontario Sessional Papers, No. 65, 1912, p. 379

**Railways and their employees**
*continued*

***The Commissioner:*** *It just operated the other way in a case that was tried the other day. A woman was suing on behalf of her children. Her husband was bicycling and came into collision with a car, and one of the principal grounds relied upon for recovery was, that by the rule of the company the motorman when he came to the grade should have shut off his power and let his car coast down the incline. Now, that rule was not made to catch the employee at all. That rule was made for the protection of the travelling public.*

***Mr. Gibbons:*** *But, Your Lordship, suppose the accident had happened to the motorman and he had been thrown from the car, would it not have worked against the employee?*

***The Commissioner:*** *If the rule was that going down the grade he should shut off his power why would he not obey that rule?*

***Mr. Gibbons:*** *Because possibly he could not take the time, and if he did, they would not have any use for him.*

***The Commissioner:*** *Your union is strong enough to guard against that.*

***Mr. Dawson:*** *One of the most terrible accidents we had in New York revealed that it was the fact that the greatest railroad in America was expecting its employees to regularly in the tunnel there to run past signals at full speed. It was a thing that none of us could be led to believe until it came out. When we looked into it, we found the New York Central was regularly expecting the engineers to send the train down that tunnel at full speed past those signals.*

***The Commissioner:*** *What was the object of the rule?*

***Mr. Dawson:*** *I think the rule was much like what has been stated. It was for the purpose of pointing to the rules in case of ordinary accidents, but they did not expect such a terrible thing to happen. It upset their calculations.*"[32]

As accidents happened quite frequently, the companies would occasionally contribute some token-sum for burial or rehabilitation or temporary support. As the magnitude of the problem became evident, however, the employees were expected to lay something aside for such contingencies. Very often this led to the founding of "mutual benefit societies" and "benevolent societies". In many cases, the railway companies even *required* their employees to join such a society. Not only were such societies frequently

32. *Ibid.*, pp. 422-423.

**Railways and their employees** *continued*

unreliable sources of insurance, however, but they were also used by the companies as still another method of controlling their employees. This resulted from the fact that membership in the plan was contingent upon further employment with the specific present employer and the fact that the plan was not transferrable. Since the wages of most employees had been calculated to be just enough to meet the necessities of life, the imposition of this new need for insurance created just another problem for the already beleaguered workman.

**The common law of negligence**

Negligence was defined by Brett, M.R. as:

> *"The neglect of the use of ordinary care or skill toward a person to whom the defendant owes a duty of observing ordinary care and skill, by virtue of which neglect the plaintiff, without contributory negligence on his part, had suffered injury to his person or property."*[33]

Success in an action in negligence was never easy. An action by a railway-worker against his employer was especially difficult. In order to succeed, the injured employee would have to establish the following elements:

1. That the railway company had a duty of care and skill towards him;
2. That the railway company had failed to fulfill that duty;
3. That as a result of that failure the employee suffered injury;
4. That the cause of the railway employee's injury was not too remotely connected with the breach of the railway company's duty to its employee.

Once that much had been established, the employee would have to rebut any of the following defences which the employer might raise:

1. The railway company could argue that the employee, by accepting employment which was known to be risky, had made a voluntary assumption *of the risk*;

2. The railway company might argue that the *employee* had himself been negligent. *Contributory negligence* was originally a complete bar to recovery;

33. *Hannon v. Pender*, L.R., 11 QBD at p. 507, cited in Harry Abbott, Q.C., *A Treatise on the Railway Law of Canada*, Montreal: Theoret, 1896, at p. 363.

**The common law of negligence**
*continued*

3. The railway company could argue that the *cause* of the accident was not the railway company, but rather that it was a fellow servant of the railway employee. This argument was based on the proposition that the employees were each responsible for their own actions. As the controlling mind which led to the accident was that of the *fellow-servant*, he alone should be liable to compensate for the damages caused.

Of course, if an employee had been killed in the accident he could not bring any action for negligence against the railway company. Prior to 1845 in England, and in Canada, the common law did not permit a widow or a child to bring suit for negligence against a railway which had caused the death of the family wage earner. This difficulty was overcome by the enactment of "Lord Campbell's Act".

An action in negligence is founded upon a duty of care and skill. But to whom does the railway company owe a duty of care and skill? This question is generally answered by assessing the *relationship* between the parties. A railway might be liable in negligence to a passenger as a result of an accident which had been caused by a failure on the part of the railway company to exercise a reasonable degree of care and skill in the transporting of the passenger. The duty to exercise such care and skill was implicit in the *arrangement* between the parties whereby the railway company agrees to transport the passenger *safely* to his or her destination.

Such an analysis, however, did not carry over into the relationship between the employer and his employees. The employees, being the agents responsible for bringing about the accident, were thought to have had the primary duty of care to avoid such accidents. The railway company in such a situation might have had a duty to devise a safe system and to hire the appropriate people to run it, but, for the most part, the obligation ended there. Beyond that, it was thought not to have had significant duties of care and skill to its employees. Hence, a railway employer could hardly ever fail in its duties, with respect to particular accidents to its employees.

Since most railways used roughly the same system, in order to establish that their duty of care had not been met it was necessary to challenge the *system* of operating a railway. Yet, since it was the system itself which would be used as the ordinary standard of care to be expected, the challenge could rarely be successful.

As legislation was passed, throughout the latter half of the nineteenth-century, to regulate the safe operation of railways, the duty of railways to their employees was markedly increased. This development triggered a new form of negligence on the part of railways which was based on the breach of statutory duty. Although the common law provided for the exercise of discretion in assessing

**The common law of negligence**
*continued*

whether or not the railway had acted reasonably in carrying out its duties to its employees, the existence of a statutory duty made this breach easier to establish, both conceptually and in a court of law.

In the circumstances in which railwaymen worked, it was often difficult to establish the cause of the death or injury which a railway worker received. If a brakeman was found dead on the tracks, it might have been concluded that he had been killed by the train, or by the fall from the train, but it would be extremely difficult to prove that his fall from the train had been caused by the breach of the duty of care and skill owed to him by the railway company. Ultimately the courts developed a rebuttable presumption of negligence on the part of the railway where the circumstances of an injury permitted a fair inference of non-performance of the duty of care on the part of the railway.[34]

The common law had developed the doctrine of *respondeat superior* before it developed the fellow servant rule. The first doctrine held that the master was responsible for the tortious acts of his servant during the course of his employment. This was illustrated and explained in the following terms:

> *"If a servant, without his master's knowledge takes his master's carriage out of the coach house, and with it commits an injury, the master is not liable, because he has not in such case entrusted the servant with the carriage. But whenever the master has entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it, but the master, in such case, will be liable, because he put it in the servant's power to mismanage the carriage by entrusting him with it."*[35]

In the landmark case of *Priestly v. Fowler*[36] Lord Abinger, C.B. is thought to have introduced the "fellow servant rule" to the common law. In that case a butcher's employee was injured in an accident while being driven by another servant to make a delivery. The court held:

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34. *Carpue v. L. & B. Ry.*, 5 Q.B. 747; *Scott v. L. & St. K. Docks Co.*, 3 H.C. 596; *G. W. Ry. Co. & Braid*, 1 Moore P.C.N.S. 101; *Chalifoux v. C. P. Ry. Co.*, 22 S.C.R. 721. Cited in *Railway Law of Canada*, *op. cit.*, p. 370.

35. *Heath v. Wilson*, 9 C. & P. 607; 2 M. & Rob. 181; *S. P. Mitchell v. Craftswiller*, 13 C.B. 237. Cited in Muse, Chapman and Spurham, *A Digest of the Reported Decisions of the Courts of Common Law, Bankruptcy, Probate, Admiralty and Divorce, etc. from 1756 to 1883 inclusive*. London: Sweet, Stevens and Maxwell 1884.

36. (1837), 150 E. R. 1030.

**The common law of negligence**
*continued*

*"If the master be liable to the servant in this extent in this action, the principle of that liability will be found to carry us to an alarming extent...But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself...In that sort of employment, especially which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail will be an encouragement to the servant to omit that diligence and caution which he is duty bound to exercise on the behalf of his master, to protect him against misconduct or negligence of others who serve him, and which diligence and caution while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."*[37]

In a later case, called *Farwell v. The Boston and Worcester Railroad*,[38] Mr. Chief Justice Shaw further developed the fellow servant rule. In that case an engineer who was injured when his train ran off the track as the result of a misplaced switch sued his employer the Boston Worcester Railroad in negligence. The court held that the doctrine of *respondeat superior* only applied where the injury was to a stranger. Since the accident was caused by a fellow servant who was definitely not a stranger, the railway company was found not to be vicariously liable for the acts of its servant. The engineer had to rely upon his contractual rights with his employer. Since his contract was silent on the matter of injury, his suit was unsuccessful.

The reasoning in the Farwell case was applied in the case of *Deverell v. Grand Trunk Railway*[39] where a misplaced switch at the Stratford Station caused the death of an engineer named Deverell when two trains collided. Mr. Justice Haggerty, following *Priestly v. Fowler* and *Farwell v. The Boston Worcester Railroad*, recognized both the voluntary assumption of risk and the fellow servant rule defences. He said:

37. *Ibid.*, pp. 1035-1037.

38. (1842) 45 Massachusetts Law Reports 49.

39. (1866) 25 Q.B. 517

**The common law of negligence**
*continued*

*"It is not easy to see how we can hold this neglect on Ryan's part not to be one of those risks which the deceased, the servant of the same common employer, did not take upon himself when he entered the service. We think to hold otherwise is to abrogate the rule laid down in the numerous cases that follow Priestly v. Fowler...To leave such a case to the jury is, as has been remarked by English judges, simply to direct a verdict for the plaintiff, where a railway company are defendants...Railway companies have to answer to the public for all neglects of their servants or agents, but the law has long declared that each servant in entering the service assumes a risk of his fellow servant's neglect."*[40]

The fellow servant rule appears to be an aberration in the common law of negligence. Its development appears to have involved an implicit decision to replace an old legal rule with a new one. Consistent with the tenets of nineteenth-century *laissez-faire* capitalism the fellow servant rule favoured the interests of the entrepreneurial class. It was a development that shifted the external costs of running the railways onto those who could least afford to bear them.

In the words of one author:

*"The rule was a declaration that economic activity need not pay for some of the losses it caused. The consequences were particularly painful for employees of industrial undertakings, especially the railroads, in which machinery caused crippling injuries on a dramatically different scale, the employees were often strangers to each other, and the corporate form of enterprise tended to make everyone involved in operating a business an employee...The work of the courts needs interpretation, and any monolithic interpretation must be inadequate. The courts believe that liability should be a consequence of fault, that is a consequence of having caused harm by willful or careless negligent conduct. This belief accompanies a more general belief, which was also expressed in the law of the market, that individuals should have responsibility for their economic fates. The courts believed that economic development was beneficial and was to be encouraged, but through settled law, facilitation and protection of individual initiative and responsibility, and liberal interpretation of legislation. These beliefs were not simply an elegant and cynical set of euphemisms, or a means to an economic end. They were a particular expression of*

40. *Ibid.*

**The common law of negligence**
*continued*

*general beliefs about society, and if they are ignored or made into a superficial rationalization the nineteenth-century legal mind is distorted.''*(41)

Although the fellow servant rule was widely adopted in Ontario, Quebec courts took a different view of the matter. They viewed the obligation of the railway companies towards their employees to be the same as the railway companies' obligations to strangers. Thus they refused to adopt the English doctrine that employers are not responsible for any injuries to their employees as a result of the negligence of fellow servants in a common employment.(42)

A further bar to the employee's recovery is expressed in the Latin phrase ''*volenti non fit injuria*'' which implies that a volunteer cannot suffer injury. What this means has been interpreted by Lord Watson in *Smith v. Baker*:

*''In its application to questions between the employer and the employed, the maxim, as now used, generally imports that the workman had either expressly, or, by implication, agreed to take upon himself the risk attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that, if injury should befall him the risk was to be his and not his master's.''*(43)

Every worker was judged to have had an obligation to exercise reasonable care and skill. If the worker had failed in that general duty, and as a result had been the proximate cause of his own injury, he would not have been able to recover compensation. This is what is known as ''contributory negligence''. Before the passing of the *Contributory Negligence Act*,(44) the bar to recovery was complete. As a result of that Act the damages recovered are simply reduced by the proportion of the contribution to the accident by the party claimant.(45)

41. R.C.B. Risk, ''The Last Golden Age: Property and the Allocation of Losses in Ontario in the Nineteenth Century'', (1977) 27 U. of T. Law Journal 199.

42. See *Rich & Ont. Nav. Co. v. St. Jean*, M.L.R., 1 Q.B. 252; *St. Lawrence Sugar Refining Co. v. Campbell*, M.L.R., 1 Q.B. 290. Cited in *Railway Law of Canada, op. cit.*, p. 388.

43. *Smith v. Baker*, (1891), Appeals Cases at p. 355.

44. S.O. 1924 c. 32.

45. *Ibid.*, s. 3.

**The common law of negligence** *continued*

A related doctrine of tort law is called "the last clear chance rule". The implication of that doctrine was that if the plaintiff could have avoided the accident through the exercise of ordinary care and skill, even though he had not caused the accident, or brought about the sequence of events which led up to it, his failure to act in avoidance of the accident was deemed to have been its "proximate cause".

As a result, his claim for damages arising from the accident would have been unsuccessful.

The arrangement between the railways and the workers meant that the railway workers, more often than not, would be the ones who would be in a position to have the last clear chance of avoiding any accident. It would be difficult to imagine how the railway itself would ever have the last chance to avoid an accident. Hence this rule shifted the onus of accident prevention to the workers alone, failing which, contributory negligence might be shown.

It is small wonder that relatively very little compensation was actually recovered by the injured railway worker under the common law of torts. In the 1912 hearings one engineer named Lawrence reported that it had been estimated that only 8% of those employees who went to court in Ohio actually recovered compensation from the company. The figure for New York was 12%. He further estimated that only 37% of the amounts recovered were left over after costs and other related matters had been taken care of. It was also his opinion that a similar situation existed in the rest of the United States and Canada.[46]

**Lord Campbell's act**

According to the Scottish common law, if a worker was killed, his widow or child could bring a suit for the damages sustained. This was not the case in England or in Canada prior to 1845. At that time Lord Campbell sponsored a bill in England providing for compensation to the families of persons killed in accidents and duels.

This legislation was readily adopted in Canada. It eventually became the *Fatal Accidents Act*, and, although it was repealed in Ontario in 1978 by the *Family Law Reform Act*, many of these provisions are still continued in a modified form in Part V of that Act, and will likely be continued in the upcoming *Family Law Act*.

*Lord Campbell's Act* allowed a son, daughter, grandson, granddaughter, stepson, stepdaughter, adopted child, and a person to whom the deceased stood in *loco parentis*, as well as a father,

46. Ontario Sessional Papers, No. 65, 1912, p. 151-152.

**Lord Campbell's act**
*continued*

mother, grandfather, grandmother, stepfather, stepmother, a person who adopted a child, and a person who stood in *loco parentis* to the deceased to bring an action for their own benefit in place of the deceased against a person who has caused the death of the deceased by a wrongful act, neglect or default. This Act overcame a very important obstruction to the recovery of damages in the event of death caused by the negligence or other wrongful act of another.

**The conflict between moral principles and the technological prerequisite of nationhood**

Different moral principles are evident in the development of the law in the nineteenth-century. The fundamental principle of Judeo-Christian morality—that it is wrong to obtain an advantage from the suffering or death of another human being—was often denied in favour of other competing values. Most prominent, perhaps, among these was that of the free human agent.

The argument went, as follows: Since human beings are free to govern their own actions they are consequently responsible for whatever happens to them. Thus they cannot look to anyone else to compensate them for the damage done to them. In the case of *Priestly v. Fowler*, Lord Abinger made it clear that one of the reasons for denying liability was that the employer should not be expected to be more responsible for the employee than the employee was for himself.[47]

Individual freedom is a concept with many different implications. As Professor Risk points out, the proposition that the workers were solely responsible for their own fates was unrealistic:

"*...because employees in the mid-nineteenth-century had to work or starve, and few of them could bargain about conditions of employment or shift from job to job to avoid a risk...*"[48]

The other side of the concept of human freedom which was elevated to a major value of nineteenth-century Canadian society is the notion that no one should be penalized for something which was not his or her fault. This principle applied as much to the employee as it did to the railway. As a result, injuries to workers were given the ubiquitous classification "accident."

If the accident was no one's fault then no one would have to pay for it. That, of course, is a very great deception. Quite obviously the injured worker did pay for it. In this fashion the costs of the

47. 150 E.R. 1030 at 1036.

48. Risk, "The Last Golden Age", *op. cit.*

**The conflict between moral principles and the technological prerequisite of nationhood**
*continued*

enterprise were shifted onto the worker himself. It is submitted that this important but subtle shift was the result of another very deeply held value which, for the sake of brevity, we shall call "technological progress".[49]

In the nineteenth-century, technological progress was very closely associated with the development of railways. No one seemed to be willing to say that these external costs of production resulting from injuries to working people were simply part of the total cost of the service or the good produced. Perhaps, in the case of railways, it was feared that they could not afford to pay these costs and continue in business.

The nineteenth-century courts were left to struggle with a complex set of competing values. Railways were deemed to be necessary, but they were dangerous. Railways effectively caused substantial injury to great numbers of workers. Nevertheless, the railways paid very little compensation for the injury caused. This in turn compounded the impact on the injured worker and his family. Yet railways were a tremendous benefit to society at large. They also earned substantial financial reward for many of their promoters. Those who undertook the enterprise did so with at least the *hope* of such reward. Thus the railways and the men who promoted them gained substantial benefit as a result of activities which caused substantial injury and death to other human beings.

On the face of it, such activity might have been judged to have been morally unacceptable. To be fair, the railways did not set out to maim and injure their workers. They believed that the workers could and would look after themselves. In the minds of the managers and owners, if the workers got hurt or injured, it was not because the railways intended it, but because of their own carelessness, or as a result of some kind of "inevitable accident" associated with the enterprise. Since the enterprise was thought to confer a benefit on the society as a whole, for a long time, that "inevitable accident" was not properly scrutinized.

Few people in the nineteenth-century understood that if their moral analysis was correct, and no one was at fault, since the accidents were inevitable, then the costs should have been shifted to the end-user of the service or product. This thinking was put forward by Mr. Dawson to the 1912 Workmen's Compensation Commission when he said:

> *"If it was really a question of John Jones over here and Frank Robertson over there, and if it was a question of the money coming out of John Jones' pocket, and not being shifted to*

49. See Jacques Ellul, *The Technological Society*, Vintage: New York, 1965. Ellul's term is "la technique".

**The conflict between moral principles and the technological prerequisite of nationhood**
*continued*

*anybody else in any way, I do not believe that the reasonings which the courts have used, and out of which this thing has been developed are on the whole erroneous or do wrong. The reason why the system itself is wrong is because what we have really been doing is permitting John Jones over there, who in this matter is only an intermediary between the community at large as consumers, and the community at large as producers, to be dealt with and treated precisely as if it was his loss. That is where the whole objection is and just on that account, if no other, I would not be in favour of a Workmen's Compensation system which held the employer individually liable.''*[50]

Ironically, by beginning with the moral analysis of fault which requires the culpability of individual human beings, the nineteenth-century reached an unfair result when it could not deal with competing moral claims. The result of a moral draw was not morally neutral, since it shifted the entire burden of occupational accident and disease onto the employee. It took a significant evolution of understanding before the law could develop.

**The role of information**

If railway accidents were the catalyst in this great social experiment called workers' compensation, then surely information was the stirring rod which brought the ingredients together more rapidly and made things happen.

From the very beginning of railways, there were accidents causing injury and death. This was probably inevitable because of the size of the equipment and the length of the roads and the fact that the systems were still in a developmental stage. Although, from time to time, spectacular accidents received public attention, the railway companies were careful to give the impression that there was no undue danger from the system itself. When the Board of Trade's Chief Inspector of Railways blamed many accidents in England in 1858 on the fact that the employees had been overworked, he was contradicted by the railway company witnesses.[51] Great efforts were made to preserve the impression that no problems existed with respect to safety on railways.

In the years from 1847 to 1870 the English railways reported a decrease in the proportion of killed and injured employees from one in 250 to one in 1,125.[52] Yet in 1876 their figures show a

50. Ontario Sessional Papers, No. 65, 1912, P. 423.

51. *Report of Select Committee on Accidents on Railways*, 1858. Evidence of Colonel George Gwynne R.E. Cited in *Victorian Railway Men*, *op. cit.* at p. 46.

52. *Ibid.*

**The role of information** *continued*

proportion of one employee killed or injured for every 167.52 employees. This would appear to be something of a mystery. The mystery is solved when one realizes that:

> *"it was not until 1871 that the companies were obliged to inform the Board of Trade of every case of death or injury of servants."*(53)

The number of reported killed and injured went up from 244 in 1870 to 1,946 in 1876 - a jump of some 700 per cent.

Dr. Kingsford suggested that even these figures are somewhat low. It is his opinion that the casualty fund of the Railway Benevolent Institution was a much better measure of the actual risk of injury or death. The reported risk of injury or death to a railway worker who was a member of that fund in 1871 was one in thirty-seven.(54) This represents over four times the ratio reported by the railways. Obviously the railway companies were still able to conceal the number and extent of injuries to their workers. Nevertheless, the requirement that railway companies report all accidents causing injury or death to the Board of Trade was an important watershed in making information available to the public and to the lawmakers in England.

Professor Risk quite rightly points out,(55) that Canadian law is not just a duller copy of English law. It is, however, important to be aware of just how many developments in Canadian law were shaped by earlier developments in English law. This was especially true in the nineteenth and earlier part of the twentieth-century in general, and with respect to railway legislation in particular.

On February 26, 1877 the legislature of the Province of Ontario ordered a Return of all accidents and casualties to life and property which had occurred in the railways of the province of Ontario in the years 1874, 1875 and 1876.(56) The companies were required to report the accidents, where they occurred, when they occurred, and all their particulars for each of the railway companies in Ontario. The Province was quite likely following the lead of the English Board of Trade.

The result was less than revealing. The report showed that: A drunken Indian who was sleeping under a loaded car got run over. A boy got killed when he was playing too close to the tracks. A

53. *Ibid.*, p. 47.

54. *Ibid.*

55. R.C.B. Risk, "This Nuisance of Litigation: The Origins of Workers' Compensation in Ontario", published in *Essays in the History of Canadian Law*", edited by David H. Flaherty, vol. 2, University of Toronto Press, Toronto: 1983 at p. 418.

56. Ontario Sessional Papers, No. 14, 41 Victoria, 1878.

**The role of information**
*continued*

woman sat down in front of the train. Some other people got hurt through their own carelessness. All in all, one might have concluded that the railways were managing to operate safely and without substantial numbers of accidents or injuries.

The Ontario Legislature still continued to press for more information. By the twenty-first of January 1880, a select committee on railway accidents had been formed by the Legislative Assembly of the Province of Ontario. The committee did not begin by trying to find out whether or not there was a significant problem. Rather it started with the task of enquiring:

> *"...into the subject of frequent accidents, in many cases with loss of life, to brakesmen and others, employed on railways..."*[57]

The committee asked the following questions in a circular which was sent around to interested parties:

"1. What do you consider the best practicable remedy to prevent accidents happening in the coupling of cars?

2. Are there any automatic couplers which have been successfully used on freight cars? If so, name them.

3. What do you consider the best means to prevent accidents arising from railway frogs?

4. What changes in freight cars are practicable to render greater safety to brakesmen when engaged in stopping trains?

5. What would be the effect of changes in the couplers, frogs, and cars of Canadian railways whilst those of the United States roads remain as at present? What other suggestions in the premises will you recommend to the committee?"[58]

The committee proceeded to interview several witnesses, both workers and management. The record of these hearings provides details of the kinds of dangers which were ordinarily faced by railway workers. It also provides us with a good insight into the different attitudes which prevailed at the time. As a result, this report was a very useful piece of information.

According to one conductor on the Northern Railroad, most accidents were caused by men falling off the trains and

57. *Report of the Select Committee on Railway Accidents*. Appendix (No. 1), 43 Victoria, 1880 at p. 3.

58. *Ibid.*, p. 6.

**The role of information**
*continued*

between the cars. In his opinion, however, this happened to men who did not have a great deal of experience.[59] The Chief Engineer for the Grand Trunk Railway offered the opinion that accidents which happened due to men getting their feet caught, could be avoided if the men used different kinds of boots which did not use straps or laces, but used a kind of elastic which would allow the foot to slip out easily. This imaginative suggestion appears to have been designed more to save the company money, than it was to decrease the danger.

Perhaps the master illusionist of the entire hearings was Mr. Broughton, who was the General Manager of the Great Western Railway. Whenever he was asked a direct and difficult question he would answer it partially; then he would counter with a statistical obfuscation, such as:

> *"...considering the number of men employed and the number of times they make couplings every year, the proportion of accidents is very small."*[60]

Then he proceeded to offer some irrelevant piece of statistical information such as the numbers of men who had different categories of service as brakesmen. The issues which he obscured were:

1. Whether all, or indeed any, of the "accidents" caused by the coupling of cars actually were "inevitable"; and,

2. Whether they could not have been avoided with a minimal expenditure, and a little simple mechanical ingenuity; and,

3. Whether those who benefitted from the operation of railways would not have chosen to eliminate the "accidents" if *they* had been forced to bear *all* of the costs incurred as a result of those "accidents".

Mr. Broughton also offered statistics to show that the accident rate on his line was less than the Canadian average. When he submitted the English railway accidents statistics, he offered some gratuitous interpretation:

> *"The conclusion they came to was they could not take the responsibility of saying the railway companies should be interfered with by the government, because divided responsibility would relieve the railway companies from*

59. *Ibid.*, p. 8.

60. *Ibid.*, p. 13.

**The role of informaiton**
*continued*

> *responsibility for injuries and loss of life; and that it would not be prudent or desirable that the government should undertake the responsibility of requiring the use of appliances that might prove false or insufficient, or of removing from the railway companies the management, of the railways.''*[61]

The issue, then, for Mr. Broughton was not safety but "who shall manage the road."[62] His main concern appears to have been to keep the government from involving itself with railway management.

By way of contrast, one railway employee with a passionate flair exhorted the committee to be diligent in its task of identifying and recommending ways of eliminating the dangers to railway workmen:

> *"The subject of protection to brakesmen while in the performance of their duties, is one which might well form a subject for consideration in the hands of a parliamentary committee, as protection to trainmen means protection to public life and property, and I feel certain that no one with a single drop of the milk of humanity can fail to be interested in the subject, and I sincerely hope that the committee will not rest or cease from their labours until the desired object is obtained, viz: as far as possible to complete the immunity from personal risk and danger to that very important class of public servants, trainmen etc.''*[63]

In general, a very sensible treatment was given to the questions which were before the committee. To the first question, concerning the best remedy for preventing accidents in coupling of cars, eleven people out of forty-six responding indicated that the use of automatic couplers would be best. Ten respondants considered that the uniformity in the height or make of the bumpers and couplers would be the most practical remedy. Two company men even suggested that sobriety and care on the part of those performing their duties would be the best way to prevent accidents. Several others recommended one or other versions of a patented coupler. Of these, Lappin's patent seemed to have been favoured.

In response to the third question, thirty-seven out of forty-three respondents recommended filling up the frogs with wood as the best means of preventing accidents arising from them.

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61. *Ibid.*, p. 27.

62. Compare Alfred D. Chandler, *op. cit.*, p. 129.

63. *Report of the Select Committee on Railway Accidents*, 43 Victoria (No. 1), 1880, pp. 40-41.

**The role of information** *continued*

In answering question four, thirteen people thought that a handrail along the running board three feet high extending beyond the car end would be best. Another thirteen thought that extending the running board itself beyond the car end to the extent of the deadwood, would be the best method of improving freight cars so as to render greater safety to brakemen who were engaged in stopping trains. Eight respondents recommended a handrail on the end of the car on one or both sides, and eight respondents recommended adopting the British system of stopping the trains by brake vans.

In response to question five, virtually everyone was in agreement that there would be no effect on the railway traffic which consisted of U.S. cars as a result of packing frogs with wood. Others pointed out that, as far as the couplers were concerned, there would be a potential problem unless the couplers were either compatible with both the old and the new system at once, or unless all of the U.S. and Canadian cars were modified simultaneously.

As far as other suggestions were concerned, eight people recommended the alteration of bridges to provide sufficient height so as to prevent a man from being struck by them while walking on top of the car. Four respondents recommended a government inspector of railways.[64]

In conclusion the committee recommended:

> *"(1) That all overhead bridges should be built so as to have a clear space of at least seven feet from the top of the highest freight car to the lowest member of the bridge above.*
>
> *(2) That the running board of a freight car should be as nearly flush with the roof of the car as possible and not less than from twenty-four to thirty inches wide, and extend as far as the deadwood of the cars will safely admit so as to leave as little space as possible beyond the ends of the running boards on each car, and also that a handrail should be placed along the side of the runningboard to be not less than thirty inches in height.*
>
> *(3) That your committee examine a large number of automatic and other couplers for freight cars, some of which appeared well-fitted for the purpose of coupling and would go far to do away with the necessity of the men going so frequently between*

64. *Ibid.*, pp. 80-82.

**The role of information**
*continued*

*the cars. The committee would therefore suggest whether, in view of the great loss of life and injury to brakemen in coupling cars, it is not desirable that the adoption of automatic couplers should be made compulsory on Canadian railway companies.*

*(4) That all frogs and wing rails on railways should be filled in with wood according to the system now in use on the Northern Railway."*[65]

As far as using the English system of braking by means of vans the committee said that it was unable to obtain sufficient evidence to warrant passing an opinion.

**Legislation designed to prevent accidents on railways**

The response to the 1880 Committee's Report and recommendations was the enactment on the fourth of March, 1881 of the *Railway Accidents Act*, 1881.[66] In the preamble, one finds the following recitation:

*"Whereas frequent accidents to railway servants and others are occasioned by the neglect of railway companies to provide a fair and reasonable measure of protection against their occurence; and whereas a proper construction of railway bridges and certain precautions in the construction and maintenance of railway frogs, wing rails, guard rails, and freight cars would greatly lessen, if not entirely prevent, the happening of such accidents..."*[67]

The legislation required existing bridges to be altered to achieve a seven foot clear space between the top of the cars and the bottom of the bridges. New bridges would also have to have such a clearance. Railway frogs were to be packed with wood or metal. The running boards were to be thirty inches in width and were to extend beyond the end of each car to a point not more than two inches less than that which the deadwood or bumper at each end of such car would extend. Thus, the *Railway Accidents Act*, 1881 adopted the specific recommendations of the committee in its report of 1880.

Having established a statutory duty to make provision for the safety of railway workers, the Act went on in Section Seven to provide that, where personal injury is caused to a railway servant as a result

65. *Ibid.*, pp. 3-4.

66. 44 Victoria, Chapter 22, 1881.

67. *Ibid.*

**Legislation designed to prevent accidents on railways**
*continued*

of a failure to provide these safety measures, *such servant would be entitled to compensation for all damages and loss sustained from or by reason of such injury.*

The Act also provided for the operation of *Lord Campbell's Act* in this regard, since it provided for recovery by the legal personal representatives of such servant or other person, and any persons entitled in the case of death. It will be recalled that *Lord Campbell's Act* extended the entitlements of a person to recovery of damages in the event of the death of his or her spouse or child, etc.

The *Railway Accidents Act* proceeded to provide defences on the part of the railway company in the case of contributory negligence, where the injured servant knew of the default or negligence which caused the injury and failed to inform his superior, or where the railway or the person which it had put in charge of such matters was not negligent in discovering or remedying the problem. This was probably designed as a measure to deter carelessness on the part of workers.

It is worth pointing out in passing that, on the very day that this Act became law, the legislature enacted another Act which provided for assistance to certain railways. This was the *Railway Aid Act*, 1881.[68] It was as if both Acts were part of the same thought.

It is, further, important to note that the *Railway Accidents Act*, 1881 was by no means the first railway accident Act in Ontario. On May 27, 1857 the Legislative Council and Assembly of Canada had enacted an *Act for the Better Prevention of Accidents on Railways.*[69] This Act provided for the appointment of inspectors to scrutinize the railways, their property, buildings, engines, cars and carriages, etc. It prohibited a railway from being opened without having been first inspected. It required the railway companies to allow the inspectors to use their telegraphs for the purpose of transmitting their messages.

If a part of the railway was unsafe in the opinion of the railway inspector, he could require that it be closed until repairs were made to his satisfaction. The railway company was to provide a proper system for communication, braking and disconnecting the cars. Moreover, the company was to provide new apparatus or to alter the apparatus as required by the Board of Railway Commissioners.[70]

68. 44 Victoria, Chapter 23, 1881.

69. 20 Victoria, Chapter 12, 1857.

70. *Ibid.*, Section X.

**Legislation designed to prevent accidents on railways**
*continued*

By Section XIV of that Act, the railway company was required to report by the 11th of January and the 11th of July in each year to the Board of Railway Commissioners with a true return of the particulars in all accidents and casualties, whether to life or to property, which had occurred during the preceding half year. Somehow, however, this provision which, incidentally preceded the more stringent requirements of reporting to the English Board of Trade in 1871 by some fourteen years, seems to have been largely ineffective. Nevertheless, it was maintained in the Dominion Statutes, and appears, for example, in the *Consolidated Railway Act*, 1879.[71]

Subsection 15 (4) of the *Consolidated Railway Act*, 1879 requires that bridges on Dominion-controlled railways must have a clearance of seven feet from the top of the highest freight car to the lower beam on any bridges under which it passes. As far as the height of the bridges was concerned, the Ontario legislation followed the Dominion provisions already enacted.

In response to the preposterous claim by Mr. Broughton, in the 1880 hearings on railway accidents, that the British committee had recommended that the government not try to regulate the railways, since that might be taken to relieve the railway of responsibility for its actions, it is worthwhile noting that Section XVII of the *Prevention of Accidents on Railways Act*, 1857 and Section 52 of the *Consolidated Railway Act*, 1879 (Can.) already provides that nothing done under either Act is to be construed to relieve any railway of or from any liability or responsibility resting upon it by law. The Dominion Act had, for some twenty-three years, already contained a provision which would prevent its use to avoid responsibility or fault on the part of railways. The issue was *not whether further government involvement would relieve the railroads of any liability at all, but rather whether or not they could effectively be made liable* for the injuries to their workers by means of legislation designed to eliminate their many defences against prosecution.

**The first workmen's compensation for injuries act, 1886**

Revolutions and constitutions notwithstanding, the law as it exists in Canada and other democratic countries has no absolute beginning. It does not come out of nothingness. The law develops through time as the expression of the will of the people as it is formed by their elected representatives. Individual laws accrete one on the other. They build entire edifices which express the rules of our social interaction. From time to time whole sections of laws are torn down and replaced.

71. 42 Victoria, 1879, Section 83.

**The first workmen's compensation for injuries act, 1886**
*continued*

The common law develops as the judicial expression of rules which are found already to exist in the ways in which reasonable men already govern their affairs. In Canada, British law forms the supporting structure of the entire edifice. This has been the case as a result of: (1) custom; (2) legislation specifically adopting the laws of Great Britain to be the laws of Canada; and, finally (3) the preamble to *The Constitution Act*, 1867. The "wisdom" of Canadian legislators has always been to take for its needs what was already available in British law, and then to improvise the rest.

On September 7, 1880 the British Parliament passed an Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service. This Act makes a step, although it is a small one, towards the elimination of the vast array of common law defenses open to an employer in resisting claims by injured workmen. Of particular interest for this report is the special status which subsection 1 (5) gives to railway workers. It says effectively:

> *"Where after the commencement of this Act personal injury is caused to a workman...by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine or train upon a railway, the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman, nor in the service of the employer, nor engaged in his work."*[72]

This subsection gives a special status to the railway worker, since only a railway worker can claim under it. This is quite obviously a clear recognition of the unique situation in which railway workers in nineteenth-century England found themselves. Not only did they face the greatest dangers, but also they faced the impossible task of bringing a successful action against the railway.

The English *Employer's Liability Act* obviously formed the foundation of *An Act to Secure Compensation to Workmen in Certain Cases* (*The Workmen's Compensation for Injuries Act*, 1886) which was enacted by the Legislature of Ontario on the 25th of March 1886.[73] It is submitted that the other current of law which flowed into this Act was the *Railway Accidents Act*, 1881[74].

72. 43 Victoria (U.K.) C. 23., S. 1(5).

73. 49 Victoria, Chapter 28, 1886.

74. 44 Victoria, Chapter 22, 1881.

**The first workmen's compensation for injuries act, 1886**
*continued*

The proof of this is found, among other things, in the similarities between Section 7 of the *Railway Accidents Act*, 1881 and Section 4 of the *Workmen's Compensation for Injuries Act*, 1886. Furthermore, Subsection 3 (5) of the *Workmen's Compensation for Injuries Act*, 1886 is virtually the same as Subsection 1 (5) of the English *Employer's Liability Act*. This section in the Canadian Act also creates a unique definition of "railway workers". The definition of a "workman" included in Subsection 2 (3) of the *Workmen's Compensation for Injuries Act*, 1886 is not found in the English Act: "Workman means... any railway servant, etc." The definition of "packing" in Subsection 2 (4) of the *Workmen's Compensation for Injuries Act*, 1886 is included to clarify the rights of railway workers under Section 4 of the Act.

Section 17 of the *Workmen's Compensation for Injuries Act*, 1886 makes a special concession to railways with an established insurance or provident society or association of which at least two-thirds of the employees are members. This provision permits such a company to remain outside of the Act, except with respect to Section 4, which defines its obligations to its employees in the event that it does not carry out the safety measures outlined there for the protection of its employees.

Quite obviously the *Workmen's Compensation for Injuries Act*, 1886 is framed with railway companies very much in mind. To be sure, it is an Act which was intended to make provisions for all workmen suffering injury in the course of their employment. However, the Act provides a special status for railway employees, and makes special provisions for their protection, and even safeguards those rules in its transitional rules. It is clear that, even more than the *English Employer's Liability Act*, the *Workmen's Compensation for Injuries Act*, 1886 was inspired in a significant way by the need to respond to injuries to railway workers.

The *Workmen's Compensation for Injuries Act* was amended several times between 1886 and 1899. The exemption for railway companies which had a compensation system which met a certain standard was extended for a further year. Railway workers, however, could discontinue their association with the Railway's Insurance and Provident Society and bring themselves, and the company in relation to them, under the terms of the Act.[75]

In the 1889 amendment to the *Workmen's Compensation for Injuries Act*, the definition of a "railway servant" was expanded to include a tramway servant and a street-railways servant.[76]

75. 49 Victoria, Chapter 28, Section 17; 50 Victoria, Chapter 22, Sections 1 & 2; R.S.O. 1887, Chapter 141, Section 16.

76. 52 Victoria, Chapter 23, 1889, S. 2 (6).

**The first workmen's compensation for injuries act, 1886**
*continued*

Section 5 of the 1889 amendment also changed the wording of Section 3 of the 1886 act. The words "any signal-point, locomotive, engine or train upon a railway," were changed to "any points, signal, locomotive, engine, machine, or train upon a railway, tramway or street railway."[77] This section eliminated the ambiguity in the words "signal point" and thus clearly extended liability to the employer of persons in control of either, or both, the signals and the switches.

A further amendment was also introduced whereby the person for whom the work was done became liable as if he were an employer in situations where he negligently owned or supplied defective ways, works, machinery, plant, buildings, or premises for the purpose of performing such work which thereby caused injury to the workman.[78] This section appears to be a forerunner of the *Occupier's Liability Act*, at least from the point of view that the person exercising care and control of buildings or equipment, etc. might be sued in negligence by persons with whom they have no direct privity of contract.

It would appear that implicit in this section is the doctrine that the duty to exercise care and skill, which could give rise to an obligation to compensate for injuries suffered, derives from the *contract* of employment between the parties. Shaw, C.J. is thought to have articulated this important principle of nineteenth-century law in the landmark case of *Farwell v. The Boston and Worcester Railroad*[79]

> *"When an employee brings an action against his employer to recover damages for an injury arising in the course of that employment it must be assumed that the contract between the parties regulates all the risks and perils of injuries arising in the course of that employment."*[80]

Section 6 of the 1889 amendment passed into the 1892 revision of the *Workmen's Compensation for Injuries Act* as Section 4.[81] This eliminated the restriction on the right of a worker to sue the person who hired his employer which derived from the "no contractual relationship (privity)" argument. George Smith Holmested in his notes on that Act says:

77. *Ibid.*, Section 5.

78. *Ibid.*, Section 6.

79. (1842), 45 Massachusetts Law Reports 49.

80. *Ibid.*

81. 55 Victoria, Chapter 30, Section 4

**The first workmen's compensation for injuries act, 1886**
*continued*

> *"This section is not to be found in the English act, and it has the effect of extending the liability of an employer in a very important particular.*
>
> *In England a person who employs a contractor, is not liable to the contractor's workmen for any injury they may sustain by reason of any defect in the employer's ways, works, etc...Thus, while under the English Act the right to compensation for injuries is restricted to cases where the relationship of employer and employee exists, this section gives a remedy to certain workmen where no such relationship exists. Under the Act as originally passed without this section, the workmen of a contractor had no claim against a person by whom the contractor was employed for any injury occasioned by a defect in the ways etc. of such person: the relationship did not exist which rendered the statute applicable, see per Boyd, see: Finley v. Miscampbell, 20 Ont. at p. 35. And he had no more right than any stranger against the employer of the contractor."*[82]

The need for this section arises from the restrictive interpretation of the duty owed to another party which holds that it arises from the *contractual* relationship between them. What is significant for our purposes is that this principle was initially developed by Mr. Chief Justice Shaw in an important *railway case*. This provision of the Act was, therefore, a response to the consequences of a railway accident.

The effect of the *Workmen's Compensation for Injuries Act* and its amendments was to gradually wear away the many defences which employers and, in particular, the railways, could set up against an attempt by an injured worker to receive compensation. Specifically, the fellow servant rule and the voluntary assumption of risk defences were diminished in scope. For example, in the 1889 amendment, it was enacted:

> *"In an action against an employer under the principal Act or this act, a workman shall not, by reason only of his continuing in the employment of the employer with knowledge of the defect, negligence, act, or omission, which caused his injury, be deemed to have voluntarily incurred the risk of the injury."*[83]

82. George Smith Holmested, *Workmen's Compensation for Injuries Act, 1892*, Toronto: 1893 at pp. 59-60.86. 52 Victoria, Chapter 23, 1889, Section 7.

83. Compare 55 Victoria, Chapter 30, 1892, Subsection 6 (3).

**The first workmen's compensation for injuries act, 1886**
*continued*

In a case called *Woodley v. The Metropolitan District Railway Company*,[84] assumed the risk involved therein. Nevertheless, as Mr. Holmested points out, the common law changed this proposition and held that the workman had not voluntarily assumed the risk in such situations.[85] Nevertheless, the *Workmen's Compensation for Injuries Act* provides a defence for the employer where the workman knew of the danger and failed to communicate it to the employer. According to Holmested, no such defence was available to the common law.[86] This shift of the legal onus of exercizing due diligence to the workman, by requiring him to report defects or dangers to his superiors, was presumably designed to encourage greater actual diligence on the part of the worker in his everyday activity. Ironically, it re-created a basis for a voluntary assumption of risk defence against a finding of liability in the employer.

The defence based on the voluntary assumption of risk appears to have developed from a distorted notion of the value of the human freedom and responsibility. Ultimately, in the Final Report on Workmen's Compensation in 1914, Sir William Meredith said:

> *"The draft bill also provides for the abrogation of the assumption of risk rule.*
>
> *"The rule is based upon the assumption that the wages which a workman receives include compensation for the risks incidental to his employment which he has to run. That is, in my judgement, a fallacy resting upon the erroneous assumption that the workman is free to work or not to work as he pleases and therefore to fix the wages for which he will work, and that in fixing them he will take into account the risk of being killed or injured which is incidental to the employment in which he engages."*[87]

Although the common law defences had been diminished by specific provisions of the Workmen's Compensation for Injuries Acts, up to the time of the complete revision of the Act in 1914, they still remained as formidable obstacles to successful recovery of compensation for injuries received to workmen.

Meredith also had little use for the fellow servant rule or the common law defence of contributory negligence. He said:

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84. 2 EX. D. 384: 36 L.T.N.S. 419.

85. Holmested, *op. cit.*, p. 82.

86. *Ibid.*, p. 83, citing *Highland and Avenue Belt Railway Company v. Walters*, 91 A LA. 435.

87. Ontario Sessional Papers, No. 53, 1914.

**The first workmen's compensation for injuries act, 1886**
*continued*

*"According to the common law it is a term of the contract of service that the servant takes upon himself the risk incidental to his employment (popularly called the assumption of risk rule), and that this risk includes that of injury at the hands of fellow servants, (popularly called the doctrine of common employment). The doctrine of common employment is an exception to the general rule that the master is responsible for the acts of the servants when engaged in his work, and has regularly, I think, often been declared unfair and inequitable. The reasoning upon which the exception was justified in the celebrated case of* Priestly v. Fowler *does not commend itself to me as satisfactory, and I doubt whether if the question were to arise now for the first time the same conclusion would be reached. This case was decided at a time when very different views as to the respective rights and duties of the employer and employee prevailed than are entertained at the present day...another rule of common law is unfair to the workman although the employer has been guilty of negligence, if the workman has been guilty of what is called contributory negligence and his injury was occasioned by the joint negligence the employer is not liable. The injustice of this rule consists in this, that though the employer may have been guilty of the grossest negligence, if the workman has been guilty of contributory negligence, however slight it may have been, and his injury was occasioned by the joint negligence, the employer is not liable."*[88]

Meredith's solution was to eliminate the fellow servant rule (also called "the doctrine of common employment") and the voluntary assumption of risk rule and to change the rule about contributory negligence to one of comparative negligence where, rather than being a bar to recovery, the negligence of the employee would act simply to reduce the amount of his recovery in a manner proportionate to his responsibility in "causing" the accident.

**Insurance**

The risks inherent in industrial society gave rise to two different forms of insurance. In the first instance, the employer was anxious to control his liability with respect to damage to his equipment, injuries to third parties, and, finally, injuries to his workmen. In the second instance employees were concerned to make provision for that terrible day when they might suffer injury or illness. Mr. Wegenast, who was counsel to the Canadian Manufacturers' Association in the 1912 hearings, put it this way:

88. *Ibid.*

**Insurance**
*continued*

*"Right here, let me point out a vital distinction between the two classes of insurance, a consideration of which is involved in any discussion of the subject of Workmen's Compensation. There is, on the one hand, accident insurance, and on the other employer's liability insurance... The insurance which the employers thus effect is not the type which affords any great protection to the workman. It is true that some employers under these systems take out real accident insurance policies for the benefit of the workman injured or the family of the workman killed... The essential feature of this class of insurance is that it is the workman who is insured. The bulk of employers, however, for reasons which are quite apparent, insure, not the workman against accident but themselves against liability for accident. And this practice has occasioned the development, in all jurisdictions where the compensation legislation takes the individual liability form, of a system of employers' liability insurance."*(89)

In Canada and England, liability insurance essentially was based upon the risk of a successful suit in negligence. Since the common law provided formidable barriers to such success, the risk was in most cases not very significant. Moreover, the insurance company which was certain to have significant financial resources could protract the litigation in the courts for several years. Even the prospect of that long battle was enough to convince the prudent injured workman to settle the claim out of court for a reasonably small percentage of the claim. In this way the tort system, as it existed, failed the individual workman.

Even if the employer had wished to be more generous in such a situation, the relationship which he had with the insurance company would have prevented it. The issue, as far as the insurance company was concerned, was not the moral obligation of the employer. Rather it was the employer's legal obligation which the insurance company was assuming under its contract. In the words of Mr. Wegenast:

*"The insurance company in the case of liability insurance assumes absolutely no moral obligation, as you have suggested, sir. It simply insures, and stands in the place, and subrogates itself to the position of the employer, and takes up the burden that he would have otherwise have borne, and takes up the defences such as they may be that the employer has,..."*(90)

89. Meredith W.R., First Intermin Report, Ontario Sessional Papers, No. 44 pt XIV, 1912, pp. 237-238.

90. *Ibid.*

**Insurance**
*continued*

Mr. Neely, answering for the insurance companies, put it this way:

> *"The insurance company sells a certain contract which is the kind of contract which the purchaser wants to buy. Now, if the purchaser being an employer wishes to cover these moral obligations, these charitable obligations or humanitarian obligations, the company is quite prepared to issue him such a contract, but when the employer tells us that he is not willing to pay for these things at all, that he wants the bare price of his legal obligation, we give him that price and we give him that contract."*(91)

The worker's chance of achieving success against the insurance companies under the employer's liability system was very small. An example is also given from the 1912 hearings:

> *"Mr. Meredith: I would like to say, Sir William, our experience of going to the courts is very bad; what we call taking it to law. I can cite the case of a man down on Adelaide Street here, where his son was killed by a car falling on him. He was attending to the airbrake under the car, and the engine came along and knocked it over and killed him. It was on the Canadian Pacific Railway out at West Toronto junction. They offered the wife something like $1,500, and the father-in-law thought that was rather a small sum for the way in which it occurred, on account of no fault whatever on the part of his son, and he took it to law. I was talking to him the other day and I think the widow and child got something like $500 or $600 after everything was paid. That shows what it means by taking it to the courts...I advised these people, take whatever is offered to you, don't go out and put it in the courts, because you will get nothing at all the chances are, and if you do get anything it will be very little."*(92)

The doctrine of the autonomy of the individual which fortified the common law defences of voluntary assumption of risk, and the fellow servant rule, and the doctrine of contributory negligence, was strongly entrenched. As Professor Risk points out:

> *"The doctrine made success unlikely, even if the worker could overcome the emotional and financial barriers to litigation. In Ontario sixteen cases involving claims by workers were reported between 1865 and the legislation in the 1880's, and the workers failed in almost all. The fellow servant rule barred recovery in eight of the cases. In two of these the plaintiff sought to demonstrate that the accident was caused by*

91. *Ibid.*

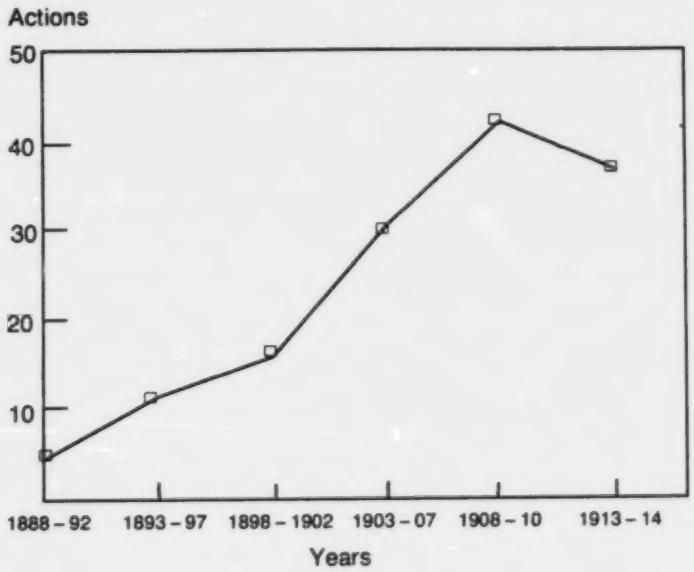
92. *Ibid.*

**Insurance**
*continued*

*inadequate equipment, for example, faulty brakes on a train, but the courts concluded that the cause was a failure by a careless fellow employee to make repairs or adjustments."*[93]

Significantly, six out of the sixteen cases were railway cases, and four out of the eight cases where recovery was barred by the fellow servant rule were also railway cases.[94]

**Number of actions brought by workers for injuries suffered in the workplace in Wentworth County.**

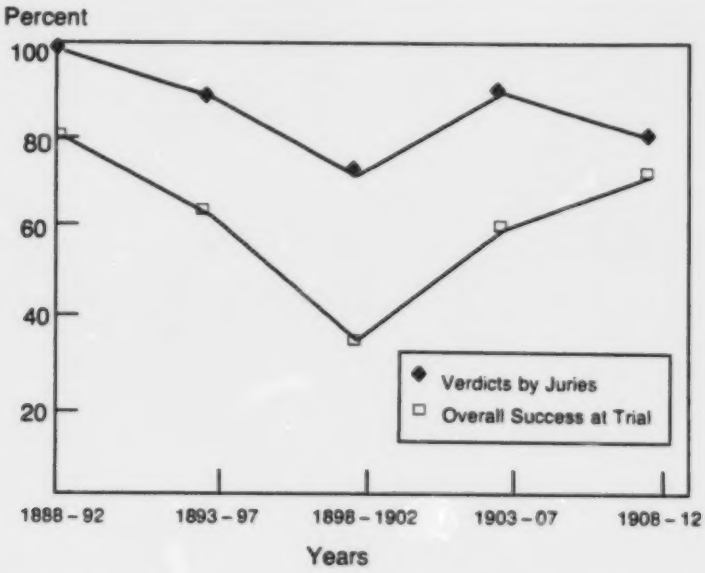



Adapted from information compiled by R.C.B. Risk in "This Nuisance of Litigation", p. 427, based on records in the Ontario archives.

93. R.C.B. Risk, "This Nuisance of Litigation", p. 422.

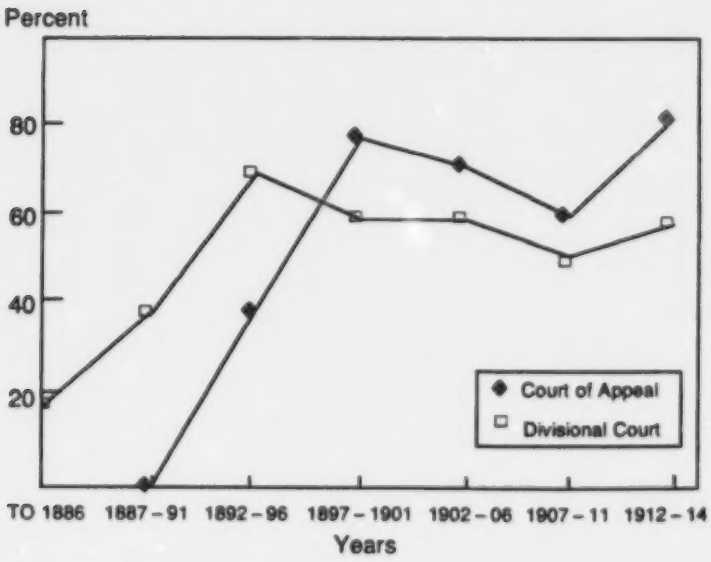
94. *Ibid*, pp. 476-477, Footnotes 9 & 10.

**Success of workers in trails involving injuries in the workplace in Wentworth County.**




Adapted from information compiled by R.C.B. Risk in "This Nuisance of Litigation", p. 428-9, based on records in the Ontario archives.

**Success of workers on appeal in actions involving injuries in the workplace in Wentworth county.**




Adapted from information compiled by R.C.B. Risk in "This Nuisance of Litigation", p. 430-1, based on records in the Ontario archives.

**Insurance**
*continued*

The impact of the *Workmen's Compensation for Injuries Act*, 1886 can be somewhat appreciated from the success rate of various appeals in actions by workers against their employers for injuries in the workplace. Professor Risk has calculated that in appeals to divisional courts from Trial division in 1886 the workers were successful in only fourteen per cent of the cases which they appealed, whereas the employers were successful in seventy-five per cent of the cases which they appealed. Overall, the workers were successful in only eighteen per cent of such appeals in 1886.

For the overall period between 1886 and 1914, workers were successful in appeals to divisional courts from trial division in forty-six per cent of the cases appealed by workers, whereas employers were only successful in thirty-seven per cent of cases which were appealed by them. The average success rate over that period of time in appeals to divisional court was fifty-four per cent on the part of workers. In appeals to the Court of Appeal from trial divisions, the record is even more dramatic. The workers' overall success in such appeals went from zero per cent from 1886 to 1891 to a high of eighty-five per cent in 1912-1914, with an average overall success in such appeals of seventy-three per cent.[95]

These figures are indicative of two things: Firstly, before 1886 even if success had been achieved by the worker at the trial level, it would very likely have been denied on appeal. Secondly, the Act of 1886 was a progressive step in obtaining compensation for workmen in certain cases.

Faced with this sorry prospect of recovery, the employees, and especially those involved in dangerous occupations such as railways, had very early banded together in mutual aid societies, or friendly societies, or friendship societies, or benevolent associations, or providence associations. The first such association is thought to have begun on the railways in England in 1838. The primary function of such societies was to spread the risk of the common employment of its members. In many cases they effectively became mutual insurance companies:

> *"At first the brotherhoods were essentially fraternal and mutual aid societies. Their members helped to protect themselves from the vicissitudes of an industrial society by providing life, sickness, and, in time, unemployment insurance.*[96]

95. *Ibid.*, pp. 430-431.

96. Chandler, op. cit., p. 129.

**Insurance**
*continued*

The development in Ontario on the Grand Trunk is described in the 1912 hearings by Mr. Meredith of the Railways Trainmens' Union:

> *"I think you all know how this matter of insurance first came up. It came up about thirty years ago. On the Grand Trunk we used to have men hurt continually, and every time that I would go and get my pay and other men would go and get their pay at the paycar, there would be some man around for a subscription for this widow, or a subscription for this man who was hurt, and by the time you gave a little for everybody you would scale your pay down pretty low; and then we found out that certain men would not give anything at all, and the generous ones contributed everything that was going. So then we really put pressure on the Grand Trunk to start up the insurance scheme, and from that time it has gone on. Then we started the Trainmen's, and the Order of Railway Conductors. We started them as mutual concerns, and really you would be surprised how hard it is to get a man to pay a few cents in to help himself."*[97]

The fact that Sir William Meredith permitted the railway companies to remain off the list of Schedule One employers in the 1914 draft legislation suggests that, as far as the insurance scheme was concerned, the railways had already adopted, through their friendly societies, or mutual insurance associations, a model which was reasonably close to Sir William's own design for a general Workmen's Compensation scheme. The modifications which he thought were required were:

1. To extend the liability;

2. To provide for a state-run system of administration, and

3. To place the fund on a sound actuarial base.

As far as a Workmen's Compensation insurance scheme was concerned, it could be organized in several ways. This was outlined by Mr. Wegenast as follows:

> *"Practically all Workmen's Compensation legislation is an effort to embody what is called the theory of 'professional risks.' Under this theory the cost of human wear and tear is supposed, like the cost of machinery, raw material, etc. to be thrown upon the industry and included in the price charged to the consumer for the product of the industry. When we come to examine the different compensation systems of*

97. Ontario Sessional Papers, No. 65, 1912, p. 253.

**Insurance**
*continued*

*the world we find three distinct methods of applying this theory. These methods may be respectively termed: the individual liability method, the collective liability method, and the state liability method. Every system in the world can be classified under one or other of these heads.*

*Under an individual liability system the liability to compensate the workman is thrown upon the individual employer as an element of the relationship of employers and employees. A term is imposed upon the contract of employment by which the employer assumes an obligation, more or less extensive, to indemnify the workman for injuries received in the course of, or in connection with, the employment. The injured employee looks for his relief to the employer, who thus becomes an individual insurer of the workman against injury. The principle of individual liability is illustrated in the English* Workmen's Compensation Act *of 1897 as extended in 1906, and in the acts which are now in force in seven of the nine provinces in Canada, including the province of Quebec. ...In all these jurisdictions employers within the scope of the law are required, regardless to a very large extent of questions of fault, to compensate their employees for injuries received by them in the course of their employment. Employers are, of course, permitted, and in some cases encouraged, to insure themselves against their liability for compensation by some form of insurance."*(98)

The 1912 hearings were, to a large extent, an attempt to decide between these different forms of insurance. The resulting legislation in 1914 is largely a manifestation of Sir William Meredith's impressions of what insurance scheme would be fair and workable in the circumstances.

The problem with individual liability insurance was that it led to a defensive strategy, the design of which was to deny compensation to the injured worker. Far too often, individual schemes were poorly designed and badly run. For that reason on April 14, 1892 the Ontario Legislature had enacted legislation which required the establishment of an Inspector of Insurance and a Registrar of Friendly Societies.(99) In order to transact insurance, the friendly societies were required to be licensed. This was done in an attempt to provide for the proper management and actuarial regulation of the friendly societies' affairs. The decision to have the Workmen's Compensation scheme regulated by the state derives from the need

98. *Ibid.*, pp. 236-237.

99. 55 Victoria, Chapter 39.

**Insurance**
*continued*

to have the administration in the hands of a neutral third party, to provide for proper management and actuarial control, and to guaranty the perpetual viability of the scheme, since any shortfall could be passed on to the employers through increased assessments.

**The current of changing legislation**

Although Mr. Chief Justice Shaw, in the *Farwell* case, had held that the duty of care and skill to be exercised by an employer depended solely upon the *contract* which he had with his employee, the employer's duty of care was also created by several statutes dealing with railways and railway accident prevention, factories, shops, and mines. Such statutory requirements to take care of equipment in certain ways, for example, rendered it much easier to maintain an action in negligence, since a breach of the statutory duty which resulted in injury to the employee might establish a *prima facie* case of negligence.

The common law defences in a diminished form were available prior to 1914. Perhaps the workman had voluntarily assumed the risk when he entered the dangerous employment. Perhaps he was injured through the negligence of a fellow servant. Perhaps he had failed to take the necessary precaution to protect himself. Perhaps he had the last clear chance to avoid the accident. Perhaps the accident was not caused by the breach of the statutory duty, but by the actual actions of the employee. In such situations compensation might be denied.

The Factories and Shops Acts, and the Mines Acts, and the Railways Acts had specified certain penalties for breaches of the stipulated requirements. It is important to stress, however, that none of those Acts in themselves provided for compensation. The negligent employer might be fined by the Act; or the railway inspector might close down the road, or refuse to let it be opened, but the workman was not provided with any redress.

It would appear that the *Railway Accidents Act* of 1881 set out the first requirement in Ontario that, where a specific legislative requirement was not met, the employer would be responsible to the employee for all damages occasioned as a result of the injuries to him caused by the failure of the railways to make such a provision. As has been pointed out above, these provisions were carried over into the first Ontario *Workmen's Compensation for Injuries Act* of 1886. Thus it was the Railway Accident Act, and not the Factory Act or the Shops Act or the Mines Act which was the forerunner of subsequent Workmen's Compensation legislation.

Thus, also, Sir William Meredith's comments that the *Workmen's Compensation for Injuries Act:* "...is erroneously so-styled, for it is really an employer's liability act", is not completely correct.

**The current of changing legislation**
*continued*

At one level the distinction between compensation and liability is really semantical, since they are both sides of the same issue. Of course where the system is not based on fault, compensation and liability need not be integrally related. In such a system, of course, there can be compensation without liability. Nevertheless, in a system based on fault, in order to establish the right to compensation it is necessary to establish the liability of the employer.(100)

There is no question that there is a vast difference between the scheme of the 1886 Act and that of the 1914 act. The reliance on fault which is central to the 1886 Act is replaced in the Act of 1914 by a largely no-fault mutual insurance scheme. The two approaches represent vast differences of social philosophy. Nevertheless, it would be a fundamental error to maintain that the 1914 Act was a radically new and unconnected beginning of workers' compensation law in Ontario. It would, it is submitted, be an equally fundamental error to maintain that the 1914 Act would have taken the form that it did without the radically new developments of the 1880 legislation which provided compensation for workmen in certain cases.

The first philosophical problem which had to be overcome was the view that was held prior to the 1880 legislation that there was no basis at all for providing compensation for workmen who had been injured on the job. Such a proposition relied upon the deeply held belief that individuals were responsible for their own fate. The suggestion that the employer should be made responsible for the injuries happening to an employee was thought to be tantamount to a denial of the highest of nineteenth-century values: individual freedom and responsibility.

It is significant that the challenge to the old views came in response to accidents on the railways. The record shows that in Canada it was thought that railways could only have been built with the direct and indirect involvement of governments. A significant proportion of nineteenth-century legislation was taken up with railway concerns. In the first place, there were the numerous Acts through which the railways obtained their charters. There was also the legislation which permitted the expropriation of lands. Although the railways were compelled to pay for these lands, they were not required to pay for all the indirect costs and damages caused by the operation of the railways.

As the railways fell on hard times governments were ultimately forced to underwrite their costs. Consequently, there is a significant quantity of legislation in Ontario from 1849 onwards which deals with specific and general subsidies to railways. No less than

100. Ontario Sessional Papers, No. 65, 1912, pp. 236-237.

**The current of changing legislation** *continued*

nineteen different methods of financing railways have been identified, many of which involved subsidies from various levels of government including loans, guarantees, donations of lands, and municipal bonuses.

Railways, however, turned out to be very dangerous places in which to work. The frequency with which hard-working men were maimed and killed while working on the railway appears to have been concealed for some time. Such matters, however, were generally known, and shocked the public conscience. It is submitted that the public conscience in this regard was significantly stirred by some dramatic developments in *information* around 1870 to 1880.

By 1871 it is known that the revenue from Canadian railways was nearly equal to the revenue of the country itself.[101] Railroads not only held a dominant place in Canadian economic life, but they had also captured the dreams and aspirations of the people. In the public mind the railway was a prerequisite for a better life, since it was the key to technological and economic progress. For all of these reasons, the railway was unique in its impact, both in respect to its presence throughout the country and in respect to the public involvement in it. It is therefore difficult to believe that it would have been possible for the average citizen of the 1870s and 1880s to avoid some sense of responsibility for the external costs which the railways were imposing on their workers.

It is submitted that the development of workers' compensation legislation in Ontario was an attempt to live up to that responsibility. Although, admittedly, the progression to a fully-fledged compensation scheme was slow and cautious, it is submitted that the catalyst for this entire development is to be found in the unique situation of the railways and the impact which the accidents to railway workers in Ontario had upon its people and lawgivers. It was as if, having financed the enterprise of Cain, they could not say that they were not their brother's keeper. It was as if, having internalized the dream, they could not turn their backs on its harvest.

The history of workers' compensation legislation in Ontario shows a clear path from the *Railroad Guaranty Act* of 1849[102] through the various Railway Acts, and Railway Accident Acts of 1857 and 1881 to the *Workmen's Compensation for Injuries Act*, 1886 through all of the amendments to the *Workmen's Compensation Act* in 1914. This is not to say that Bismarck's social legislation of the early 1880s was not a fundamental model for the 1914 act.

101. Trout, op. cit., p. 31.

102. 12 Victoria, Chapter 29.

**The current of changing legislation**
*continued*

Rather, it is to say that the consideration and acceptance of such an approach was only possible in Ontario at that time as a result of a history which was so closely linked to the railway. It would not, however, be surprising if the same factors were experienced, to a certain degree, by other jurisdictions.

**Junctions**

We have seen that the *Railway Accidents Act*, 1881 provides a direct link between railway accidents and compensation. The Act which follows many of the recommendations of the 1880 Report of the Special Committee says:

> *"Where within this province personal injury is caused to a railway servant, whilst in the employment or service of a railway company, on any railway owned, worked or operated by said railway company, or to any other person lawfully in, upon or about said railway, or any other train or car thereon, and such personal injury has been occasioned or arose either wholly or partly (1) by reason of the lower beams of members of the superstructure of any highway, or other overhead bridge, or any other erection or structure over said railway not being at all times after the lapse of twelve months from the passing of this Act, of a sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet from the top of the highest freight cars then running on such railway, and the bottom of such lower beams or members; or, (2) by reason of the space between the rails and any railway frog, extending from the point of such frog backward to where the heads of such rails are not less than five inches apart, not being at all times after the lapse of three months from the passing of this Act filled in with packing; or, (3) by reason of the space between any wing rail and any such railway frog, and between any such guardrail and any other rail fixed and used alongside thereof as aforesaid, and between all wing rails where no other rail intervenes, (save only where such space between the heads of any such wing rail and railway frog as aforesaid, or between the heads of any such guardrail and other rail fixed and used alongside thereof as aforesaid, or between the heads of any such wing rails where no other rail intervenes as aforesaid, is either less than one and three-quarters of an inch or more than five inches in width), not being at all times during every month of April, May, June, July, August, September and October, excepting the months of April and May next after the passing hereof, filled in with packing; or (4) by reason of the running board on the roof of any boxcar used for freighting purposes on any such railway, after the lapse of twelve months from the passing of this act, not being of a sufficient thickness and strength, and at least thirty inches*

**Junctions**
*continued*

*in width, and with proper and safe supports, extending the whole length of such car and beyond each end thereof to a point not more than two inches less than that to which the deadwood or bumpers at each end of such car shall then be likewise extending, such railway servant or other person, or in case the injury results in death, the legal representatives of such servant or other person, and any persons entitled in case of death, shall be entitled to recover from such railway company compensation for all damages and loss sustained from or by reason of such injury; and where any such injury has been so caused to or suffered by any such railway servant, the right of compensation and the remedies against the railway company shall be the same as if such railway servant had not been a servant of, nor in the employment of the railway company, nor engaged in its work.''*(103)

No one has any illusions that this section constitutes a comprehensive workers' compensation act. The point is that having established a statutory duty to exercise care and skill with respect to certain important risks to the safety of railway workers, the section eliminates the fellow servant rule in respect to these risks, and consequently breaches the dam erected by the common law defences against recovery of an injured workman against his employer.

On the very day on which this important Act was given assent, the Ontario government passed another Act to provide aid for certain railways.(104) It was as if it had been decided that participation in the funding of railways would only be acceptable if railways were made responsible for injuries caused as a result of their enterprise.

Without understanding this background, several sections of the Ontario *Workmen's Compensation for Injuries Act*, 1886 would not be comprehensible. That Act says: ''The expression 'workman'...means any railway servant...''(105)

*''Where, after the commencement of this act, personal injury is caused to a workman... (5) by reason of the negligence by any person in the service of the employer who has a charge or control of any signal points, locomotive, engine or train upon a railway; the workman, or, in the case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same*

104. 44 Victoria, Chapter 23.

105. *Ibid*, Subsection 2 (1).

**Junctions**
*continued*

> *right of compensation and remedies against the employer as if the workman had not been a workman of, or in the service of the employer, nor engaged in his work."*[106]

Section 4 of the *Workmen's Compensation for Injuries Act* adopts the first three subsections of Section 7 of the *Railway Accidents Act*. Section 5 of the *Workmen's Compensation for Injuries Act*, moreover, incorporates for all workmen the provisions outlined in Section 8 of the *Railway Accidents Act* for railway servants.

This section sets out that the right to compensation depends upon the negligence of the employer. Both of these sections are derived from the English *Employer's Liability Act*, 1880.[107] All three Acts limit the amount of compensation to the equivalent of the estimated earnings during the three years preceding the injury to a person employed at the same level.[108]

A study of its provisions clearly shows that the *Workmen's Compensation for Injuries Act* of 1886 was an amalgamation of the English *Employer's Liability Act* of 1880 and the Ontario *Railway Accidents Act*, 1881. It has been widely accepted that an important impetus for the English *Employer's Liability Act* was the regular occurrence of significant injury to workmen as a result of accidents on railways. Moreover, as has been demonstrated above, the impact of accidents to railway workers was even more significant to the Ontario *Workmen's Compensation for Injuries Act* of 1886.

A search of the statute books reveals an inordinately high percentage of legislation involving railways. A similar search of the law reports indicates a similarly high proportion of litigation relating to railways. The attitudes of the railway management were rigid and autocratic. Thus they were predisposed to offer strong resistance to any attempts by workers to collect compensation though the courts for their losses due to injuries suffered in the workplace. This was generally the case regardless of how much sympathy they may have felt personally for the suffering of the workers.

This situation was exacerbated by the involvement of insurance companies whose sole role seemed to be to resist the efforts to obtain compensation. Professor Risk puts it this way:

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106. 49 Victoria, Chapter 28, Subsection 3 (5).

107. 43 and 44 Victoria 1880, Section 2.

108. 43 and 44 Victoria, Chapter 42 (U.K.) 1880, Section 3; 44 Victoria, Chapter 23, (Ont.) 1881, Section 9; 49 Victoria, Chapter 28, (Ont.) 1886, Section 6.

**Junctions**
*continued*

*"Workers alleged that employers exploited the delay and uncertainty by appealing cases only to force workers to give up and accept unfair settlements and to discourage others from making claims. The number of cases in which the Grand Trunk alone appealed cases involving small amounts invites some sympathy for this allegation."*[109]

It would appear that the railways accounted for roughly half of the significant litigation under the *Workmen's Compensation for Injuries Act* 1886 and its amendments up to 1914.

It is important to realize that railway accidents could have had an important influence on the final form of workers' compensation in Ontario even though at times it would appear that that legislation developed the way that it did in spite of the influence of railway accidents. In the minutes of evidence of the first interim report on laws relating to the liability of employers of 1912, it would almost seem that the railways were not even intended to be included in the scheme. It did not seem that the railway companies had been invited to take a significant part in the proceedings, nor did it seem that the railway workers had been invited to state their case.

A certain Mr. Meredith who represented the Brotherhood of Railroad Trainmen, Switchmen and Conductors almost seemed to have simply stumbled upon the proceedings. He said:

*"I represent the railroad men of Ontario. I just came here to watch as I thought probably we would have nothing to do with the Act at all, being a provincial Act."*[110]

Because of the division of powers in the *British North America Act*, 1867, (now the *Constitution Act*, 1867), however, the provincial Act, dealing as it did with compensation, *did* affect the railway workers.

It is interesting to ponder what relationship might have existed between this Mr. Meredith and Sir William Meredith who chaired the committee. Was there a relationship between the parties which might account for the railways not taking a more active role? If so, what was it? In Sir William Meredith's draft bill, the railways were left out of the list of Schedule One employers. Did this mean that the railways were receiving favoured treatment? Sir William Meredith's explanation was as follows:

*"The inclusion of railways in Schedule One was opposed by the three principal steam railway companies and by some*

109. R.C.B. Risk, "This Nuisance of Litigation", p. 459.

110. Ontario Sessional Papers, No. 65, 1913, p. 142.

**Junctions**
*continued*

*of the other railway companies, and I saw no reason why their wishes should not be met if by meeting them the Act would not be rendered less beneficial to the employees and no injustice would be done to the employers in the industries included in the schedule. The draft bill has been framed so as, in my opinion, to work no injustice to anyone and not less than officially to the employees owing to railways being excluded from the schedule.*

*"The only difference between the operation of the Act as to industries in Schedule One and those in Schedule Two is that employers in the former contribute to the accident fund and in that way pay collectively the compensation, while employers in the latter do not contribute to the accident fund but are liable individually for the compensation payable to their employees. In other respects the operation of the Act is the same in both cases. The board determines the amount of the compensation in both cases and its orders when filed in a county or district become orders of the court and may be enforced as judgements of it.*

*The reasons for adopting the collective system have practically no application to railways, specially when, as has already been done in Ontario and will, I do not doubt, be done when the Parliament of Canada meets, provision is made that sums payable for compensation shall form part of the working expenditure of the railway company, which is a first charge upon its revenues."*(111)

It is quite possible that Sir William Meredith's biggest concern was the actuarial one. It was known that the railways had a disproportionately high percentage of accidents leading to injury or death. The reason why Workmen's Compensation legislation had bogged down from 1899 until the time of Sir William Meredith's hearings had to do with the fact, among other things. that the actuarial problem which Professor Mavor had identified in his report, as the central difficulty, had not been satisfactorily solved.

The biggest threat which faced the workers' compensation schemes throughout the world in their early stages was the determination of the proper risk and premium factors. Thus Sir William Meredith's decision to permit the railways to stay out of the Schedule One list, at least temporarily, could well have been motivated by a desire to achieve success for the new system in general. Of course there could have been personal and political influences as well which have not been fully identified.

111. Meredith, *The Final Report*, Ibid.

**Junctions**
*continued*

Sir William Meredith was definitely interested in proposing a measure which would pass the House. It must be remembered that he had had previous experiences with legislative proposals which failed to get through the house. In 1878 he had sat in the Ontario Legislature as the leader of the Conservative opposition. When he proposed a modified version of the English *Employer's Liability Act*, 1880 in an attempt to greatly expand employers' liability, the government had blocked it. When it brought in its own Act a year later, it had removed most of his changes.(112)

Not only was Sir William Meredith concerned about getting the bill past the house, but he was very much aware of the importance of experiment and compromise:

> *"Wegenast protested against excluding the railways 'on the ground of principle,' and Meredith said: 'Principle is nothing: it is all expediency.' Later, Wegenast protested against experiment, and Meredith replied 'My dear sir, it is all experiment. It is empirical legislation.'"*(113)

If the railways, which were the major cause of accidents causing injury or death in the workplace, could be left out of the first stage of the compensation scheme, and if their workers would have to rely on actions against the railways themselves, was this new scheme really a complete provision for workers' compensation?

It would be tempting to conclude that Meredith's condemnation of the 1886 Act as not being a compensation Act at all was motivated by his frustration in not having been able to get his ideas implemented in 1885. It would also be tempting to conclude that his failure to include the railways in the Schedule One employers rendered his final recommendations in the proposed draft bill subject to the same criticisms which he had levelled against the 1886 act. On the contrary, however, it would appear that he had not only accommodated the railways by allowing them to remain separate from the general class of employers, but he had strengthened the economic viability of the entire plan.

By insuring that the provisions for extending liability applied to the railways as well as to employers generally, Meredith had acted to protect the rights of the railway workers. By extending the administration of the Act to the railway company employees he had assured that the costs of litigation would be minimized and that the outcomes would not be in doubt. By making the payment

112. R.C. Risk, "This Nuisance of Litigation" at pp. 455-456.

113. Quoted from *The Final Report*, Minutes of Evidence, 263 and 551 in Risk, *Ib'd.*, at p. 491, footnote 157. Emphasis mine.

**Junctions**
*continued*

of compensation claims a first charge on the revenues of the railway he had given the workers' claims for compensation a priority over those of the owners and shareholders of the companies. In such a way the costs would be more completely spread across the population who might be expected to benefit from the operation of the railways, since it would be expected that such costs would be passed on to the end users in order to obtain an acceptable rate of return for the shareholders.

Far from being ignored and left out, the railways had an important place in Sir William's scheme to achieve compensation for injured workmen in Ontario. To be sure, the railways did not play as large a role in the development of the *Workmen's Compensation Act*, 1914 as they did in the development of the 1886 Act. The problems in 1914 were those of extending the limits of liability and of providing for the risk.

To a casual observer it would appear that almost all of the problems of establishing a system of workmen's compensation remained to be solved in 1914. There is, of course, a very important sense in which this is true. Up to 1914 most of the obstacles to successful recovery of compensation for injury received in the workplace were still there. Those who take "the snapshot view of history" will thus feel justified in adopting the view that workers' compensation in Ontario really began in 1914.

The problem with this view is that the development of human history is so fundamentally linked to the results of history past. Since so much of human life is determined by the expression of human values, many new forms of social organization are absolutely unthinkable without some radical alteration of the dearly-held values of any particular age. Up until the end of the nineteenth-century in Ontario it was assumed that the responsibility for accidents could only rest with the injured workers themselves. It is not that there isn't some truth in that, but, rather, that it is only half of the truth. On the other hand, it would be ludicrous to suggest that employers wanted to see their workmen injured. It would, moreover, be equally ludicrous to suggest that a significant proportion of workmen were even indifferent to suffering pain, or being mutilated or killed. That being the case, the real question is: Should not those benefiting from an enterprise pay for its incidental costs, including those costs of compensation to workers who are injured in the workplace?

We have already seen that the *Factories Act*, the *Shops Act*, and the *Mining Act* are all quasi-penal statutes. They lay down rules with penalties for their infraction. Nowhere is there evidence of a compensation element in any of these statutes. This clearly differentiates them from the early *Railway Accidents Act*, 1881 where compensation is provided. To be sure, the Factories, Shops

**Junctions**
*continued*

and Mining Acts do establish statutory duties. Such duties are one essential element of the common law of negligence. It is crucial to realize, however, that they do not provide a sufficient statutory basis for the compensation of workers in the event of injury.

**An overview**

Historical events do not follow one another in a linear chain of cause and effect. Every event occurs as the end result of the interaction of several contributing factors. Occasionally, all one can say of an event is that it would never have occurred in the way it did, or at the time that it did, had it not been for some important contributing factor. Of course, no one can focus on all of the millions of tiny contributing influences. When the development of workers compensation legislation in Ontario is considered as an historical event, one has to carefully assess the historian's methods of distinguishing those elements which can be ignored from those elements which are of particular significance.

All too often there are significant accretions of "facts" on the surface which tend to bury the significance of other factors which lie beneath the surface. The history of workers' compensation in Ontario is as much the history of values in transition as it is of debates about the relevant merits of the German system and the English system or about the proper actuarial approach to administering a compensation scheme. Very rarely does one see, in all of the talk and debate, a clear articulation of the values which one or other of the participants held most dearly. Nevertheless, if one digs through the surface of all of the information available in the 1912 hearings, one discovers a very different set of values than those which were articulated by Mr. Chief Justice Shaw in the *Farwell v. Worcester* railways case.

It is submitted that an increase in moral sensitivity to human suffering generally only develops through a contemplation of one's vulnerability. Generally the most vivid reminder of this comes when tragedy strikes nearby. It is a thesis of this report that in the nineteenth-century in Ontario the experience of the railways was a catalyst for bringing about a general change in the underlying values of the society. This is not to say that it was the only such factor, but rather that it was one of strategic historical significance. It is further submitted that such a change would not have taken place, and probably could not have taken place, without the development of certain eruptions of information which would have been necessary to bring the sense of tragedy and moral scandal closer to the individual citizen. Such a change in the level of information is exemplified in the qualitatively different reports of railway accidents which were given to the British Board of Trade following 1871.

**An overview**
*continued*

Good information is an absolute prerequisite for making a reasonable assessment of human conduct. It not only permits the individual to identify the applicable general principles and to evaluate their impact on human life, but it also assists in predicting the inevitable consequences if circumstances are not altered. Proper information is quite vital to the process of regulating one's affairs wisely. Good legislation cannot be assured to come about without it. Good legislators would not attempt to proceed in its absence.

Thus one can see, where an industry is concerned about legislation, that its first line of defence is to conceal information about its activities. Although this would probably not be in that industry's long-term best interests, it might serve to delay public involvement in the process of governing that industry.

There are two forms of information which generally impact on the decision-making process in the regulation of an industry. The first is the form which information takes for public consumption. This, in a democratic society, is generally disseminated by "the media".

The second form which information takes in this process involves the studies done both by managers in the private domain, and by legislators in their pre-legislative gathering and assessment of data.

It is submitted that, in a democratic society, remedial social legislation generally does not come about in the absence of one of these forms of information. The presence of both forms of information is necessary to the legislative process. A study of the interrelationship between these two forms of information would reveal a great deal about the legislative history of any jurisdiction. It is, however, beyond the scope of this investigation to make a detailed analysis of that interplay. It is sufficient to say that such an analysis is important to a complete understanding of why our legislation has taken the particular form which it has today.

The suggestion put forward here is that very significant information events must have preceded the legislative developments in 1881, 1886 and 1914. It is further submitted that before there can be any improvements in legislation affecting occupational health and safety in general, or workers' compensation in particular, that similar developments in information will have to occur first.

Information also has a quite different role in this development. If one accepts the economic model which says that, to a greater or lesser extent, individuals are risk averse, and, therefore, that the optimal situation with respect to accident prevention occurs when the parties both lose as a result of the accident, one might reach some strange conclusions. For example, one might conclude that depriving a worker of compensation might increase deterrence.

**An overview**
*continued*

It is submitted that the general idea of achieving deterrence by reliance on human aversion to risk is not totally without merit. Because the idea has been wrongly applied, however, its truth has been overlooked.

The proper articulation of the principle, it is submitted, is that the optimal situation with respect to accident prevention occurs when all parties *believe themselves* to have the most to lose as the result of a course of conduct which leads to occupational accident or disease. The second quite different role of information in the prevention process involves a developing of an awareness by all parties of the nature and extent of their potential losses as a result of occupational accident or disease.

The role of deterrence in the evaluation of who should pay what to whom and on what event in relation to accidents in the workplace has always been implicit in the discussions of causality and fault. Such reasoning, for example, was articulated in the landmark case of *Priestly v. Fowler* where it was held that if a servant were to be allowed to sue his master for the negligence of a fellow servant that deterrence would be diminished.[114]

In the *Farwell* case Mr. Chief Justice Shaw outlined the argument for deterrence as follows:

> *"Where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party may require. By these means, the safety of each will be much more effectively secured, than could be done by resort to the common employer for indemnity in cases of loss by the negligence of each other."*[115]

Nevertheless, according to Mr. Chief Justice Shaw, the absence of liability on the part of the master does not derive from the servant's greater ability to avoid the accident. Rather it results from the nature of the contract of employment. He said:

> *"...it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because*

114. (1837) 150 E.R. 1030 at 1037. See note 36, above.

115. (1842) 45 Mass. L.R. 49.

**An overview**
*continued*

> *the servant has a better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in court, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract express or implied.''*[116]

By developing a new line of argument based on the *contractual* relationship which provided a further barrier to the successful recovery for damages by the injured workman, the learned Chief Justice made the deterrence argument less important and prevented a more complete understanding of it. It was also thought that, as a matter of public policy, it would not be correct to allow compensation to a worker who had failed to meet a proper standard of care in the workplace as a result of which the accident had been caused. This was not based on the deterrence argument, but, rather on some primitive sense of retributive justice.

This thesis could only be even partially valid, however, where there is complete *information* about all of the significant changes involved and where there is a causal link between the lack of care and the result. Lack of information and training at all levels, faulty equipment, poor design, dangerous organization and practices all influence the ''standard of care'' which a worker may be able to meet.

Even Sir William Meredith in the 1912 hearings appeared to have had difficulties with the proposition that an employee whose negligence had caused the death of another worker should be compensated for the injuries which he had received from the same accident. It was an issue which he took up again and again throughout the hearings. In the end he appeared to resolve it as a matter of expediency rather than as a matter of policy by accepting the principle of universal compensation. His concerns were twofold:

1. That it would be an outrage to the public conscience to indemnify such a person; and,

2. That it would not provide a sufficient deterrent for negligent workers.

It is submitted that all of these and other related concerns missed the fundamental point: That it is not the actual punishment which is meted out to the negligent worker which provides an effective

116. *Ibid.*

**An overview**
*continued*

deterrent, but rather, that it is only the worker's *perception* of that punishment or loss which could possibly affect his behaviour. It is hard to imagine more severe "punishment" that might be meted out by any civilized system of justice than actually results from accidents and disease in the workplace. Even the cruelest punishment imagined by the khans, and the shahs, the ayatollahs, the Inquisition, or The Star Chamber can scarcely exceed the brutality which actually results from occupational accident or disease.

It is for that reason that the second role of information could be very important for achieving the optimal level of deterrence. Of course, the model adopted assumes that individuals are to some degree or other risk averse. Whether or not that assumption is correct, there are those who would call it into question. It is submitted, nevertheless, that if individuals are not risk averse, then deterrence is not possible.

Information, in the sense of facts about accidents, may have been necessary in order to effect significant changes in legislation. It was not, however, sufficient to bring about those changes. Other factors were also necessary. It was, for example, necessary to challenge the prevailing ideals and values. Significant errors in conceptual analysis went largely unnoticed for long periods of time as a result of inadequate analyses of underlying values. Challenges to those values also only came about over a long period of time.

To some extent, those challenges were also influenced by the dissemination of information. In all likelihood, two other important factors also helped to shape this development. They were the growth of education and the general overall improvement of conditions of life. Possibly a third factor was also at work. This involved the progressively greater emphasis on things of this life, as opposed to those of the hereafter, which developed from the progressive secularization of the nineteenth and twentieth centuries. An adequate assessment of such developments, however, is not within the scope of this report. It is sufficient to say that the stream of historical development is not a one-dimensional one; and, secondly, that determinations of the appropriate balance to be achieved between the conflicting claims of parties in the 1850's were very different in the 1880's and in 1912.

It is submitted that these changes in results came about not only because there were "progressive" developments of information, but also because there were fundamental changes in the underlying social values. It should also be noted that these two factors influenced each other. The underlying social values determined which information would be sought and given significance. The dissemination of information provided a basis for the challenge to existing values.

**An overview**
*continued*

Consider the role of the underlying values and the development of information in determining whether or not employees should be compensated for injuries in the workplace. The original analysis of this issue demonstrates a fairly significant error in conceptual analysis. This error, it is submitted, resulted from a widely-held but distorted value judgment.

The argument goes as follows:

1. No one should be punished unless he or she is at fault.
2. In many cases no fault could be found in the conduct of the employers. This was because they had not "caused" the accidents. They had not "intended" the accidents to occur.
3. Therefore, the employers should not be punished.
4. Requiring an employer to compensate an employee constitutes a penalty, or a punishment.
5. Therefore, an employer should not have to compensate an injured employee in circumstances where the employer is not directly at fault.

In reply to this, let us turn the argument around:

1. No one should be punished or penalized for something which is not his or her fault.
2. Being forced by circumstances to suffer an occupational accident, disease or death, effectively penalizes a worker.
3. Many such events are not the fault of the worker.
4. In many cases, no amount of money could ever compensate for the total penalty to the worker.
5. Compensation is simply an attempt to offset by way of money and services the penalty which has been wrongfully imposed on the worker.
6. If the employee is not compensated, the net result is that he or she is effectively penalized for something which is not his or her fault.
7. This is a denial of propositon #1. Therefore the employee ought to be compensated.

Neither legislators nor judges throughout most of the nineteenth-century were inclined to raise this argument. Instead, they referred to the principle of the voluntary assumption of risk. The conceptual

**An overview**
*continued*

problems with that principle have been discussed above. It will be recalled that the reliance upon the freedom of the individual in these circumstances ignores the objection that the individual was not free to refuse to work. There was, therefore, an underlying value which had to be challenged before the law could change.

The difficulties which the nineteenth-century had in this respect in overcoming the self-contradictory nature of the above argument may be linked to political considerations which determined that the interests of some were more highly valued than were the interests of others. It has also been suggested that the inability to come to grips with this problem arose because the institutions of lawgiving and the administration of justice were controlled by a certain class. Moreover, it might also be suggested that corporate management was governed by men whose very sense of their own manhood required maintaining absolute control.

Whatever truth there may be in those hypotheses, it is submitted that, in the middle of the nineteenth-century, there was fairly widespread acquiescence in this particular judgment of who should bear the risk. Even the workman, regarding the possibility of accident *ex ante*, acquiesced. *Ex post*, after he had been affected by an accident, his perceptions often changed. The chief role of information at this level is to heighten the sensibilities of the parties involved.

It is submitted that a fundamental reason for the failure of the people of the mid-nineteenth-century to grapple with the conceptual problem inherent in failing to compensate injured workers derived from their view of the prevailing social contract. The social contract of mid-nineteenth-century Ontario was obviously formed within the "myth of progress". It was widely believed by all economic classes that the technological development made possible by the railways, and to some extent industrialization in general, was an overwhelming benefit to everyone. *Ex ante* one could willingly sacrifice oneself to this new god. Only with an extensively documented, and widely promulgated, chronicle of occupational accidents and disease, was it possible to challenge this judgment.

The development of workers' compensation legislation in Ontario was significantly influenced by a high degree of risk from employment with the railways and an awareness of that risk which led the parties to challenge the underlying fairness of the values which they held so dear and which formed their social contract. It is suggested that as workers' compensation is going through a period of stress and critical evaluation, even today, it is important to remember the lesson learned from the past. In an effort to decrease the financial burden and to properly allocate the responsibility, one may be tempted to impose unwarranted burdens on the wrong parties. It is vital to realize that, in general, the cost

**An overview**
*continued*

of workers' compensation is a cost of producing a product. It should thus be borne by end users of that product. This is the only way to resolve the contradictions in the "no punishment without fault" argument, outlined above.

In order to achieve optimal deterrence, it is submitted, more widespread research and dissemination of information on occupational accident and disease is required. Since nothing could increase the actual penalty which is now imposed on the injured worker, it is important to increase his or her perception of it.

**Appendix A**

An illustration of how placing the burden of paying the costs of compensation on the employers even as a class might have acted as a deterrent may be seen in the accident figures for railway employees for the years just prior to and just after Sir William Meredith's 1914 Workmen's Compensation Act was enacted. Although the railroads still subscribed to their own insurance scheme, it must be remembered:

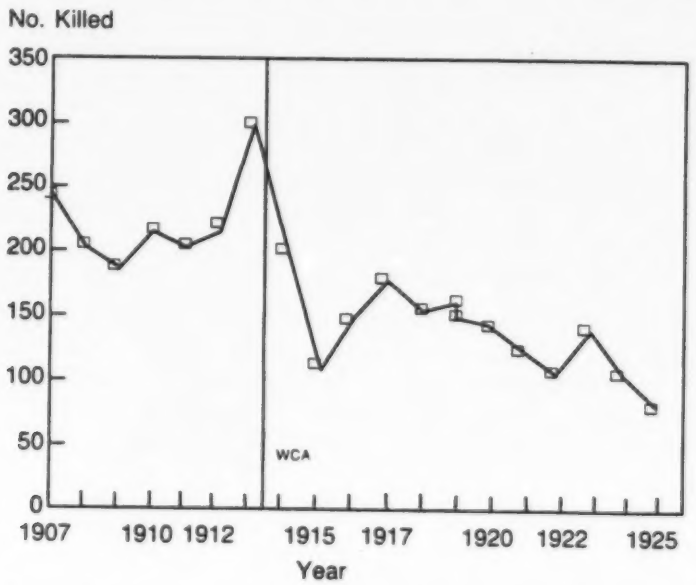
1. That the common law defences had been stripped away pursuant to the Act; and,

2. that the railways ultimately had to pay the losses even if they were initially covered by insurance.

These figures include fatalities to railway employees from the movement of trains, but they do not include fatalities on electric railways. They are also figures for all of Canada, not just for Ontario.

| Year | Fatalities[117] |
|---|---|
| 1910 | 214 |
| 1911 | 202 |
| 1912 | 215 |
| 1913 | 298 |
| 1914 | 200 |
| 1915 | 108 |
| 1916 | 149 |

**Canadian railway employees killed by moving trains.**




Source: Statistics Canada. Historical Statistics of Canada (Second Ed.).(117)

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117. F.H. Leacy, editor, *Historical Statistics of Canada* (2nd edition): Statistics Canada T251-270. The number of railway workmen killed increased generally from 1908 to 1914. Around 1914 the number fell dramatically and has declined generally until 1941. This suggests that the 1914 *Workmen's Compensation Act* may have effectively reduced the number of rail fatalities in Ontario.

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